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The Principle of Fairness:

Theory, Defence, and Application

by

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DECLARATION

I declare that this thesis is my own work and has not been submitted for a degree at another university.

ABSTRACT

Theories of social justice propose various principles for the just regulation of social institutions and practices. However, why should individuals comply with the rules of just social institutions? To answer this question, a theory of obligation is required.

This thesis examines and defends the principle of fairness as a theory of individual obligation. It begins by reviewing the debates within political philosophy over the principle since its initial formulation by H. L. A. Hart. Thereafter, the defence of the principle of fairness proceeds in three stages. First, the thesis explores the moral foundations of the principle. It is argued that the concepts of right, equality, and fairness as reciprocity work as the moral foundations provided that fairness as reciprocity has priority over right and equality. On the basis of this reciprocity-based foundation, a revised principle of fairness is stated, which specifies the conditions for the justification of an obligation to follow institutional rules. Second, the thesis rebuts main objections levelled against the principle: the consent argument, the limiting argument, and the utility argument. Finally, the principle of fairness is defended as a principle that has appealing normative implications for one of the most important challenges we face in recent times, global climate change.

With theoretical elaboration, defence against main objections, and practical application, this thesis presents a comprehensive development of the principle of fairness as a plausible theory of obligation.

0. INTRODUCTION

No pain, no gain; no obligation, no justice.

This thesis presents a comprehensive development of the principle of fairness as a plausible theory of obligation; the principle is morally grounded, defended against the main objections, and applied to a practical issue, global climate change.

Why do I develop a theory of obligation in the age of theories of justice? For the last four decades, since Rawls published his book *A Theory of Justice* in 1971, political philosophy has been dominated by the question of social justice. As Rawls begins his book by saying that ‘justice is the first virtue of social institutions’ (1971: 3), principles of justice are supposed to apply to social institutions rather than individual persons (ibid. 54). Individual persons are simply and naturally, for Rawls, required to support and follow the principles of justice that should guide the institutions to which they belong. In other words, for Rawls, principles of justice apply to social institutions and not directly to personal conduct.

There are some critics and defenders of Rawls’ institutional conception of justice. The critics say that principles of social justice should apply to personal conduct as well as social institutions (Cohen 1997; 2000; Murphy 1999). I call this the personal conception of the site of justice. The defenders uphold Rawls’ institutional conception of justice by maintaining that the subject of social justice

is not individual but institutional in nature (Pogge 2000; Nagel 2005). I call this the institutional conception of the site of justice.

No matter whether we follow the institutional or the personal conception of the site of social justice, it is true that individuals are required to do something for social justice; they are required either to ‘support and further just institutions’ or to promote what just institutions are established to promote - by themselves if they can. I believe that social justice can be achieved not only by institutional or personal rules set up in the direction of justice but also by individual compliance, the compliance with the requirements of just institutions or with what justice requires. In other words, it is only when individual compliance as well as just institutional/personal arrangements are in place that social justice may be realised.

Thus, the following question needs to be addressed: what are the conditions under which an individual has an obligation to follow certain institutional rules? This question cannot be adequately answered by a theory of justice but by a theory of obligation. This is the case for conceptual reasons. A theory of justice is a theory that aims to articulate what is a fair distribution of various benefits and burdens. The issue of the conditions that justify holding that an individual is under an obligation to follow certain requirements is a different question and one that cannot simply be answered by observing that a society’s distribution of benefits and burdens is just. Some consent theorists would claim that the presence of just social institutions is neither necessary nor sufficient for holding that an individual has an obligation to follow the institutional rules. Therefore, the issue of how to justify an obligation to follow rules needs further

discussion even when we have established the demands of justice.

It is one thing to establish institutional or personal rules in the direction of justice while it is another to make a person conform to the requirement of just institutions or personal justice. A theory of justice works for a just arrangement of social institutions or personal rules, whereas a theory of obligation is necessary to establish that individuals are under an obligation to follow the rules of just institutions or personal justice. An understanding of why individuals have an obligation to be supportive of just institutions or to be just personally will help just institutions to thrive and the 'personal conversion to take place.

Nonetheless, this should not be mistaken to mean either that the institutional conception of the site of justice is wrong or that the personal conception is right. The institutional and the personal conceptions belong to the problem of the site of justice, which does not address the question of individual obligation. Founding a liberal egalitarian edifice of justice, Rawls holds that justice should permeate through social institutions and practices. So far as an individual obligation and duty is concerned, he subscribes to the principle of fairness and natural duty respectively (Rawls 1971: 108-117). On the other hand, Cohen argues for the necessity of just personal choices in addition to institutional arrangements in the direction of justice. As far as an individual obligation is concerned, he does not suggest or support any theory of obligation that justifies an imposition of an individual obligation to make just personal choices. Discussions about the site of justice are to be distinguished from a theory of individual obligation. A theory of individual obligation is compatible with both the institutional and the personal conceptions of the site of justice. Individuals

can be required by a theory of obligation to comply with (reasonably) just institutional rules or to follow just personal rules.

Of course, the question of duties and obligations of individuals has been central to political philosophy throughout its history. In particular, the problem of political obligation is a perennial issue in political philosophy, asking how to account for the fact that individuals are under an obligation to obey rules or laws. The discussions within traditional political philosophy have focused on the relationship between political authority and individual obligation. Thus, when traditional political philosophy explains individual obligation, it normally does it by justifying or legitimising political authority. However, the theory of obligation that I shall defend in the thesis explains individual obligations, not by legitimising political or institutional authority, but by addressing the rightness of the obligation itself, and also its practical imposition.

Why, then, do I defend the principle of fairness as a plausible theory of obligation? First of all, the principle of fairness matches our considered convictions about when individuals are under obligations to follow the rules of an organisation. Briefly speaking, the principle asserts that it is fair to do one's share in return for one's benefit according to relevant rules. The sense of reciprocity is so strong that we have a tendency to return evil for evil, although the principle of fairness does not appeal to the idea of retaliation but fair reciprocity, i.e., doing one's share in return for one's benefit. (Thus, I remain agnostic on the question of whether reciprocity requires making a return for the burdens one has suffered as well as making a return for one's benefit.) The principle of fairness appeals to fairness as reciprocity, which attracts our moral

intuitions and will be explored in the thesis in great detail.

In addition to its ability to match our intuitions about obligation, the principle of fairness can be developed as a suitable theory of obligation for a non-ideal world. In the provision of the goods that are provided by a cooperative effort of individuals, ordinary people have a tendency to free-ride on the shoulders of others. When it is possible and easy to benefit from a cooperative effort of others without doing a fair share, people are more likely to take advantage of the situation in which the goods in question are provided without control over access. It is right to say that beneficiaries should do their share in return for their benefit. However, why do they have to do so, especially when it seems that their non-compliance does not cause any harm to the cooperators? Thus, in question is an obligation to bear the burden which has been borne collectively by others, without whom it would be impossible, at least in part, to make the goods in question available at all. Appealing to fairness as reciprocity, the principle of fairness requires that beneficiaries should do their share in return for their benefit which is received from the effort of others. The context and the very nature of the principle are suitable to justify an obligation to do one's share in the provision of non-excludable goods in the non-ideal world.

Despite its desirability and plausibility, however, the principle of fairness has not been fully developed yet as a theory of obligation. The principle was initially formulated by Hart, adopted by Rawls as a theory of obligation, and also reviewed as a candidate theory of political obligation by many philosophers (Simmons 1979; 2001; Klosko 1992; 2005; Horton 1992; Wolff 1995; Dagger 2000; 2010; Carr 2002; Knowles 2010). However, as much as the principle was

attractive in explaining an obligation, the principle faced a number of objections from various philosophical perspectives. There has been an ongoing debate on the principle; however, it has not been scrupulously developed from within. The most extended discussion of the principle is George Klosko's *The Principle of Fairness and Political Obligation* (1992). Nonetheless, this is just another defence of the principle against one of the main objections levelled against it as a theory of political obligation; he focuses on political obligation and suggests what he calls 'the indispensability argument' against 'the limiting argument'.

To date, the moral foundations of the principle have not received adequate attention. In this thesis, I attempt to show that the moral foundation of the principle of fairness is what I call fairness as reciprocity. Having clarified this moral foundation, I go on to show how various objections to the principle might be rebutted and how the principle might be used to address certain practical problems, such as the problem of global climate change.

The thesis has three stages for the project of developing the principle of fairness as a theory of obligation: theoretical establishment, defence from main objections, and practical application. As a preparation for the theoretical establishment, Chapter 1 reviews the debate on the principle since it was introduced to moral and political philosophy by Hart in 1955 and adopted by Rawls for a part of his theory of justice in 1964 and 1971. The review does not only look at what has been discussed about the principle and the objections. It also looks for basic ideas of the principle that need to be fully explained by a desirable theory of obligation, and candidate conditions the principle is supposed to meet to make it eligible as a theory of obligation.

Through chapters 2 to 4, the moral foundations of the principle of fairness are examined in detail with the following question in mind; why should beneficiaries do their share in return for their benefit from a cooperative scheme set up by others? Chapter 2 examines one answer to that question developed by Hart, namely, the right of cooperators not to be harmed by the non-compliance of beneficiaries. According to what I call the fair right thesis, supported by the interest theory of right, beneficiaries should do their share in order not to infringe on the right of cooperators. Having analysed the relationship between cooperators and beneficiaries in terms of the provision and the consumption of the goods in question, I find that the right of cooperators can work as a moral foundation of the principle of fairness *on condition that* there is a natural duty for beneficiaries to do their share in return for their benefit.

A similar view is defended in Chapter 3, in which equality between cooperators and beneficiaries is analysed as a possible moral foundation of the principle of fairness. Equality of compliance is suggested as the relevant equality between the parties; beneficiaries should comply with the requirement of the principle of fairness just as cooperators have complied with the same requirement; this may be called the fair equality thesis. However, the fair equality thesis is, I argue, dependent upon the moral fact that there is a natural duty for beneficiaries to do their share so that the thesis does not get trapped by the inequality problem, according to which the compliance of beneficiaries causes inequality between the complying beneficiaries and the non-complying beneficiaries, i.e., free-riders.

The conclusions of Chapter 2 and 3 require the following chapter to

investigate this natural duty for beneficiaries to do their share; how can we explain the natural duty? Chapter 4 scrutinises carefully the concept of reciprocity and suggests fairness as reciprocity as a moral basis of the natural duty. Briefly speaking, I argue that fairness as reciprocity requires beneficiaries to do their own share in return for their own benefit and to do their share according to relevant rules. It is also pointed out that a natural duty to do one's share that is based on fairness as reciprocity is activated by an act of benefiting.

With the moral foundation of the principle of fairness in place, Chapter 5 explains under what conditions the principle comes into operation, in terms of four main elements of the principle: beneficiaries, cooperators, the goods in question, and a scheme of cooperation. The identity of beneficiaries is explained while the role of cooperators is analysed in detail. Also, the chapter clarifies the characteristics of the goods in question and the conditions that a scheme of cooperation should satisfy if the principle of fairness is to apply in practice. Having explored all elements of the principle of fairness, I present the revised principle of fairness that reflects relevant conditions for the principle, highlighting some differences between the revised principle and the original statement of the principle by Hart.

In Chapter 6, the principle faces the main objections: the consent argument, the limiting argument, and the utility argument. It is argued that the principle is well placed to rebut these objections. The consent argument is heavily dependent upon the willingness of the agents, who owe a duty-based, not a consent-based, obligation. The limiting argument is subject to the analysis of the degree of involuntariness; while the limiting argument claims that only

voluntary beneficiaries should be under the requirement of the principle of fairness, it is argued that beneficiaries should receive benefits on a sufficiently involuntary basis so that they are not responsible for their free-riding. The utility argument is criticised as lacking the concept of fairness, which is the core of the principle of fairness.

Finally, Chapter 7 applies the principle of fairness to a practical issue, global climate change. Having set up the question of climate obligation, - i.e., do we have an obligation to join climate change regimes? - the chapter suggests the principle as a successful theory of climate obligation by explaining why beneficiaries of climate change regimes should come under an obligation to join the regimes and follow their rules. With regard to the question of climate obligation, I defend the principle of fairness as preferable to other theories of obligation such as consent theory, natural duty theory, and the normal justification thesis proposed by J. Raz.

At the end of the thesis, the principle of fairness will have been morally established, will have rebutted main objections, and will have been test-driven, to a satisfactory extent. However, this thesis does not put an end to the project of developing the principle of fairness as a theory of obligation. As the principle is applied to more practical issues, the principle will be refined and developed as a more eligible and desirable theory of obligation. This thesis is an opening contribution to an ongoing project of developing the principle of fairness as a plausible theory of obligation, which, I believe, is necessary for the realisation of theories of justice.

1. THE PRINCIPLE OF FAIRNESS: A REVIEW OF THE DEBATE

We are not to gain from the cooperative labors of others
without doing our fair share.
(John Rawls 1971: 112)

1.0. INTRODUCTION

The principle of fairness initially formulated by Hart (1955) and conditionally adopted by Rawls (1964; 1971) is a promising candidate for a theory of obligation. Briefly speaking, those (beneficiaries) who benefit from a scheme of cooperation for which others (cooperators) have complied with the scheme's rules have an obligation to follow the same rules. It is fair to restrict the liberty of beneficiaries as that of cooperators has been restricted in the process of producing the goods in question. On the basis of the idea of 'mutuality of restrictions' (Hart 1955: 185), which is interpreted by Klosko as 'similar treatment of similar individuals' (Klosko 1992: 34), the principle of fairness puts beneficiaries under the fairness obligation, a counterpart of the compliance of cooperators. It is morally right to treat similar individuals similarly, to borrow Klosko's terms.

Ever since the principle of fairness was launched, it has been facing a number of objections: is it fair to require a contribution as a return for a benefit that one has been *forced* to receive?; it is only from *voluntary acceptance* of

benefit that an obligation should follow; should beneficiaries make a contribution that is greater than their benefit? Against these objections, of course, there have been efforts to defend the principle: purely public goods are so indispensable that every single individual wants them unless she is irrational; mere receipt of benefit is enough to bind beneficiaries; indispensable goods are always worth the cost of them. There are some more issues on which critics and defenders of the principle have had an ongoing debate: they concern consent to the rules of a cooperative scheme, the justice of the scheme, the intention of cooperators, the restriction of the liberty of cooperators, among others.

Even though there has been an ongoing debate on many aspects of the principle, surprisingly enough, the principle itself has not been fully constructed from within yet; it only has been objected to and defended without being comprehensively constructed. Even Klosko, who published the book, *The Principle of Fairness and Political Obligation*, only defends the principle against an objection called ‘the limiting argument’, focusing on a feature of the goods at issue. It is therefore necessary that we examine the principle from its initial formulation to reformations through the debate, so as to prepare the principle for a thorough development.

This chapter, a preliminary work for a full and comprehensive construction of the principle of fairness, will review the debate on the principle as a theory of obligation. For the review of the debate, I will introduce the principle of fairness devised by Hart and transformed by Rawls, and illustrate how the principle has been criticised and defended by later philosophers with respect to numerous aspects of the principle. The main purpose of the review is

to identify basic ideas and candidate conditions of the principle; basic ideas by which I mean fundamental virtue or value that morally justifies the requirement of the principle, and candidate conditions that refer to circumstances under which the principle comes into operation.

Although there have been many objections levelled against the principle so far, not every single argument related to the objections or defences will be explored in this review. Instead, having introduced the principle of fairness, I will review the debate on the principle with regard to three main objections to the principle: (1) the consent argument, (2) the limiting argument, and (3) the utility argument¹. The consent argument and the limiting argument focus on the intention of beneficiaries while the utility argument highlights the worth of the goods in question. Most defences against these arguments pay attention to the characteristics of benefits.

However, the review of the debate does not attempt to validate objections or defences, but only tries to find out basic ideas of the principle and its candidate conditions; it is not reasonable to examine the debate on the principle of fairness until the principle is thoroughly worked out. I will conclude the chapter by suggesting that there are two basic ideas underpinning the principle and various candidate conditions, leaving a number of issues regarding these to be discussed in depth in later chapters.

¹ Here I follow Richard Dagger in categorising objections to the principle of fairness into three kinds (Dagger 1997: 68-78), which I call the consent argument, the limiting argument, and the utility argument.

1.1. THE PRINCIPLE OF FAIRNESS

This section introduces the principle of fairness as explicated by Hart and its voluntarist version put forward by Rawls, during which two basic ideas and some candidate conditions are discovered.

1.1.1. Hart's statement

In 1955 Hart wrote:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission (Hart 1955: 185).

This sentence gave birth to the principle of fairness in contemporary moral and political philosophy. To restate the principle very simply, when a group of people have their liberty restricted for a scheme of cooperation and others benefit from this scheme, the cooperators have a right to require the beneficiaries to do the same as they have done.

There are some technical terms to be figured out. Everyone in a scheme of cooperation is a beneficiary of the scheme, either deliberate or unintentional. Among beneficiaries, there are cooperators who join the process of the production of the goods in question by complying with the rules of the scheme voluntarily or involuntarily: while some cooperators comply willingly, others in fact the majority just make a contribution in return for their benefit, as a result of

which they are considered as cooperators. At any rate, cooperators are those who benefit *and* comply with the rules of a cooperative scheme. There are also some beneficiaries in a scheme of cooperation who benefit, but do not *comply with* the rules of the scheme and they are called ‘free-riders’. While beneficiaries benefit with or without their intention and cooperators follow the rules of the scheme consciously or unconsciously, free-riders benefit from the scheme knowingly much of the time, but unknowingly sometime. In brief, beneficiaries are those who benefit from a scheme of cooperation; while cooperators follow the rules of the scheme, free-riders do not. However, by beneficiaries I mean narrowly those who benefit from a cooperative scheme and are yet to become either cooperators or free-riders according to whether they comply or do not comply with the rules of the scheme.

Because one purpose of Hart’s article containing the original statement of the principle was to discover a way to create a ‘special right’, this statement was written from the view point of cooperators who have the right to require an obligation from beneficiaries. That is, it is cooperators with their restricted liberty who have the right to require beneficiaries to comply with the rules of a cooperative scheme. From this we can find an important condition for the principle of fairness: the restriction of the liberty of cooperators. This means that it is when and because beneficiaries take advantage of the sacrifice of cooperators that they have an obligation to cooperators. In other words, if cooperators were not deprived of their liberty, they should not have the right to require beneficiaries to obey the rules of a cooperative scheme, so beneficiaries do not incur the obligation. Thus, I find condition 1 for the principle of fairness:

Condition 1: The restriction of the liberty of cooperators

It becomes clearer that the obligation of beneficiaries depends upon the restriction of the liberty of cooperators when we find Hart establishing the principle on the idea of ‘mutuality of restrictions’ (1955: 185). He believes that beneficiaries as well as cooperators should be obligated for the sake of equality between them. As Klosko finds it a general idea of fairness that similar individuals should be treated similarly (Klosko 1992: 34), Hart understands the concept of fairness as ‘equal treatment of all men’ (1955: 191).

In the case of mutual restrictions we are in fact saying that this claim to interfere with another’s freedom is justified because it is fair; and it is fair because only so will there be an equal distribution of restrictions and so of freedom among this group of men (Hart 1955: 190-1).

That is, if cooperators are obligated in the process of cooperation, those who benefit from the cooperation are to be obligated, too. Thus, I call the obligation imposed on beneficiaries by the principle of fairness *the fairness obligation*. This not only confirms condition 1 but also reveals a basic idea of the principle of fairness;

Basic Idea 1: ‘Mutuality of Restrictions’

One might say that those who benefit should be obligated to do their

share in return. That is, it is not because both beneficiaries and cooperators should be treated similarly but because beneficiaries benefit that they are to be obligated. For Hart, however, the reason why beneficiaries incur an obligation to cooperators is that they benefit at the price of the liberty of cooperators. If cooperators have not sacrificed their liberty in cooperating, they do not have the right to the restriction of the liberty of beneficiaries, and thus beneficiaries are not to be obligated. Accordingly, the restriction of the liberty of cooperators is a necessary condition for the principle of fairness for Hart who finds the concept of fairness in equal treatment of both cooperators and beneficiaries. ‘Mutuality of restrictions’ is certainly one fundamental idea of the principle of fairness².

Hart bases the principle of fairness on ‘mutuality of restrictions’ and this is proved by his saying that ‘the moral obligation to obey the rules in such circumstances is *due to* co-operating members of the society’ (Hart 1955: 185, his italics). He derives an obligation of beneficiaries from the sacrifice of cooperators. The idea here is that beneficiaries should not exploit the effort of cooperators. However, we cannot take this to mean that beneficiaries can take benefits free of charge on condition that they do not take advantage of cooperators. It does not necessarily follow from the fact that an obligation of beneficiaries is due to the sacrifice of cooperators, that there is no obligation on beneficiaries when cooperators do not sacrifice their liberty. Of course, from the initial statement of the principle, we cannot definitely say that beneficiaries have an obligation regardless of the sacrifice of cooperators. However, neither can we

² ‘Mutuality of restrictions’ will be discussed in detail in the following two chapters as to whether it can be a moral foundation of the principle of fairness.

conclude that a benefit irrelevant to the sacrifice of cooperators can be freely taken. It is plausible that ‘no exploitation’ of others means ‘no free-riding’ rather than free-riding.

Let me take an example. We have an obligation to pay the TV licence fee for watching TV in the UK. The BBC is a corporation that is funded by the TV licence fee and those who pay the fee are allowed to benefit from the service of the BBC. If we watch TV that is a good produced by the compliance of the fee payers, we are also to pay the licence fee for our benefit just as other payers do. However, it is not exclusively because other viewers pay the licence fee that we are to pay our licence fee, but also because we watch TV. It is surely fair for us to be obligated to pay the licence fee as other viewers are obligated. Both we and others are to be equally obligated to pay the fee, but the obligation for us to pay is not always owing to the fact that others pay. It is free-riding per se to watch TV without paying for a licence. This shows that there is another basic idea of the principle of fairness:

<p>Basic Idea 2: No free-riding</p>
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1.1.2. Rawls’ statement

The principle of fairness is conditionally adopted by Rawls who adds a contractualist view. He states the principle as follows:

This principle [of fairness] holds that a person is under an obligation to do his part as specified by the rules of an institution whenever he has

voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests, provided that this institution is just or fair, that is, satisfies the two principles of justice... We are not to gain from the cooperative efforts of others without doing our fair share (Rawls 1971: 342-3).

The fundamental idea is almost the same as that of Hart: when there is a cooperative scheme in which people produce some goods at the price of their liberty, those who enjoy the goods should also do their fair share. We can confirm that two basic ideas are underpinning the principle in this statement: ‘mutuality of restrictions’ and no free-riding. It is fair to treat cooperators and beneficiaries equally. It is also fair to require beneficiaries to do their fair share.

What distinguish Rawls’ statement from that of Hart are two additional conditions: voluntary acceptance of benefit and the justice of a cooperative scheme. Rawls makes a note that ‘the principle of fairness has two parts: one which states how we acquire obligations, namely, by doing various things *voluntarily*, and another which lays down the condition that the institution in question be *just*’ (Rawls 1971: 343, italics added). Voluntary acceptance, for him, is the way beneficiaries come under an obligation and also a condition that should be met in order for them to be obligated. Even if beneficiaries receive some benefits, they are not to be obligated unless they voluntarily accept them. In the same light, although they voluntarily accept benefit, they are still not to be obligated to *unjust* institutions. So, we can add two more conditions for the principle of fairness:

Condition 2: Voluntary acceptance of benefit

Condition 3: Justice of a cooperative scheme³

1.1.3. Two versions of the principle

Rawls' version of the principle of fairness should be distinguished from the version by Hart with regard to the intention of beneficiaries. For Hart, *mere receipt* of a benefit is sufficient to generate an obligation, which can be imposed only with *voluntary acceptance* of a benefit for Rawls. The latter will be called the 'voluntary acceptance' (VA) version, and the former the 'mere receipt' (MR) version.

It would help to make a distinction between voluntary acceptance and mere receipt. According to Simmons' distinction between *mere receipt* and *voluntary acceptance*,

to have [*voluntarily*] *accepted* a benefit in the right sense, I must have *wanted* that benefit when I received it, or have made some *effort* to get the benefit, or at least not have actively *attempted* to avoid getting it (Simmons 1979: 108, italics added).

'To want or to make some effort' can be regarded as an action of voluntary acceptance while '*not have actively attempted to avoid getting it*' does not look

³ While Rawls finds a scheme of cooperation just when it follows his principles of justice that are nationally applicable to people within the scheme, Pevnick (2006) adds an international condition that the scheme be fair to people outside the scheme. What it means for a scheme to be just will be discussed in greater detail in chapter 5.

like an action of the same kind. If I do not actively attempt to avoid getting a benefit, do I *voluntarily* accept the benefit? This could be true if it is harder to be given than to avoid the benefit; yet, this is hardly the case. It is easier, for example, to keep staying in the current country and just be given the benefit of national security rather than to emigrate in order to avoid it. If I have not actively attempted to emigrate from the current country to another country, have I voluntarily accepted the national security of the current country? Clearly not. So, *voluntary acceptance* of a benefit cannot mean not to actively attempt to avoid it. In this case, although it is true that I have received the benefit, it is not true that I have voluntarily accepted it. It looks more plausible to say that I *merely receive* the benefit when I do not avoid it and am given it. Thus, it should be meant by *mere receipt* that when I receive a benefit, I have *not wanted* the benefit, or have *not made any effort* to get the benefit, or sometimes have not intentionally tried to avoid getting it. If one has wanted, or has applied for, and obtained, child benefit, for example, one has *voluntarily accepted* it. On the other hand, one has *merely received* the benefit of national security if one has not wanted the benefit, or has not sought it, or has not intentionally rejected getting it.⁴

Simmons regards the version by Hart as the VA version by Rawls. He supposes that Hart had in mind ‘the same sort of condition on the principle as Rawls’ (Simmons 1979: 108). Simmons believes that Hart had *voluntary acceptance* of a benefit in mind as a condition for the principle. He finds the clue to the need for voluntary acceptance in Hart’s note that ‘not all obligations to

⁴ A more detailed discussion is in chapter 6 with regard to the relevance of voluntary acceptance to the construction of the principle of fairness.

other persons are deliberately incurred, though I think it is true of all special rights that they arise from previous *voluntary actions*' (Hart 1955: 185; Simmons 1979: 108, italics added). In fact, when Hart built up the principle of fairness, he did not clearly say whether beneficiaries have merely received or voluntarily accepted benefits. However, from the text, it is the first part of the above quotation that explains the fairness obligation: 'not all obligations to other persons are deliberately incurred'. That is, for Hart, the fairness obligation is not obtained deliberately by voluntary actions. This turns out to be clear when we see the contrast Hart makes between the reason for keeping a promise and the reason for the fairness obligation. According to him, a person is bound to keep his promise because he has *freely chosen* to do so while an individual is obligated to do his fair share because *it is fair* to do so (1955: 184, 190-1, italics added). Arneson also finds Hart's intention in mere receipt of benefit rather than in voluntary acceptance of it:

Hart at any rate proposed the principle in order to correct the tendency of the social contract theorists to assimilate all sources of obligation to voluntary consent of the sort found in promise making (Arneson 1982: 617).

For Hart, it is not because beneficiaries voluntarily accept benefits but because it is fair to require beneficiaries to do their part that the fairness obligation arises. So I call Hart's statement the MR version of the principle of fairness.

On the other hand, beneficiaries in Rawls' VA version are bound to do their part as a result of their *voluntary acceptance* of benefits. Rawls often

repeats the idea of voluntary acceptance (Rawls 1964: 10, 11; 1971: 111, 112, 336, 342, 343), and points out that *both* conditions should be met for an obligation to arise: voluntary acceptance and the justice of a cooperative scheme (Rawls 1964: 10; 1971: 112, 343). Thus, we arrive at the conclusion that there are two versions of the principle of fairness: the MR version and the VA version. According to the MR version of the principle of fairness, beneficiaries have the fairness obligation if they merely receive the goods at issue; while they have the obligation only when they voluntarily accept the goods according to the VA version. This distinction is important in understanding objections to the principle of fairness.

1.2. THE CONSENT ARGUMENT

Since the principle of fairness by Hart (the MR version) and its voluntarist version by Rawls (the VA version) were introduced, there have been a number of objections⁵ and defences⁶. Of the objections to the principle, the consent argument is made strongly by Nozick. He also raises some points about the utility argument with regard to the relationship between the benefit and the cost

⁵ Smith (1973), Nozick (1974), Simmons (1979), Miller and Sartorius (1979), Greenawalt (1984), Wolff (1995), Carr (2002, 2004), Durning (2003), and McDermott (2004).

⁶ Lyons (1965), Bell (1978), Arneson (1982), Macdonald (1984), Maphai (1987), Klosko (1987, 1992), Cullity (1995), Dagger (1997), Lefkowitz (2004), and Penrose (2004).

of it. In this section, I deal with his consent argument only, putting aside the utility argument for later. Nonetheless, the consent argument will not be evaluated in detail but only introduced in brief. Defences and criticisms against the consent argument are also only briefly discussed because the purpose of this chapter is only to identify basic ideas and candidate conditions for the principle of fairness. Evaluations of the objections will be saved until the principle of fairness is fully constructed.

1.2.1. Objection: no consent, no obligation

The consent argument made by Nozick is very simple: without consent to obligation, there is no obligation. He makes his argument against the principle of fairness by giving several examples which are all of the same kinds. His most famous example (the public address system) is the most crucial.

Suppose some of the people in your neighbourhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? (Nozick 1974: 93)

‘Surely not’, Nozick says. He is quite sure that the principle of fairness ‘would not serve to obviate the need for other person’s *consenting* to cooperate and limit their own activities’ (ibid. 95, his italics). There is no obligation for those who do not *consent* to join the project and to comply with its rules. You are not to be obligated to spend your one day for others who have benefited you already or will benefit in their turn, *unless* you have given your own consent. In other words, the fact that you have enjoyed the broadcasting others have produced in their turn does not bind you to take your turn for the service without your consent to do so. For Nozick, there is no obligation to obey the rules of the project in the absence of the consent to take part in the project. In generating an obligation by the principle of fairness by Hart and Rawls, the pivotal point is whether or not citizens benefit from cooperation. However, for Nozick, it is not the receipt of a benefit but the consent to a scheme of cooperation that creates an obligation because he believes that ‘forced’ benefits are not benefits that can require corresponding burdens. The consent argument is based upon the feeling that ‘others should not be able to *force* any scheme they like upon us’, to borrow Simmons’ rephrasing (Simmons 1979: 121).

1.2.2. Defence: being participant in cooperation

N. Bell asserts that Nozick has a false idea of individuals and society. According to him, Nozick’s line of argument suggests that ‘individuals are in a kind of social vacuum and that there is no web of social practice serving to link them together’ (Bell 1978: 72). Because of this, Bell argues, Nozick misses the point that ‘a passive recipient of the benefits of the public address system was not a

party to the transaction' (ibid. 67). The fairness obligation arises only when one accepts benefit from a scheme of cooperation in which one is a participant because '*portraying oneself as a participant* in a practice is the action which makes the acceptance of benefits voluntary and thus generates the obligation' (ibid. 68-69, his italics). If an individual is in a position where she can opt (not) to consent to the rules of a scheme of cooperation, she is outside the scheme and thus not to be obligated to abide by its rules⁷.

Bell's argument seems to defend the principle of fairness from the consent argument in a way, but also suggest another condition for it: beneficiaries should be participants in a scheme of cooperation. That is, if someone benefits incidentally or intentionally from a scheme of cooperation but is not a member of the scheme, she is not required to follow its rules. If participation in a scheme is understood as taking place by consent, Bell's argument goes back to support Nozick's consent argument. However, seeing from Bell's criticism of Nozick's idea of individuals and society, it is not the case for Bell that individuals can opt to participate in social practice by consent or whatever else. Although he does not discuss in the same article why Nozick's idea of individuals and society is false, he believes that individuals '*stand in a special natural relation to one another*' (ibid. 71, his italics), so they do not need to consent to each other concerning the fairness obligation. Thus, it is out of question with regard to the principle of fairness, at least for Bell, that

⁷ Bell's argument leaves another question: can beneficiaries outside a scheme of cooperation be exempt from the fairness obligation? Given the purpose of this chapter, however, this point will be discussed later on.

beneficiaries should be participants in cooperation.

Then, is this still not a condition for us either? If we follow Bell's criticism of Nozick's idea of individuals and society, do we not need to go through a process to participate in a scheme of cooperation, in any way, in order to be bound to the fairness obligation? Can it be a condition for the principle of fairness that beneficiaries already be participants in a cooperative scheme? For now, I will not examine whether it can be a necessary condition, but because it is likely that there can be beneficiaries, for instance, who enjoy clean air from the neighbouring country's national park, I only assume this condition to be pertinent.

Condition 4: Beneficiaries' being participants in a cooperative scheme

1.2.3. Criticism: voluntary acceptance of benefit

There is a criticism of Nozick's *consent argument* from the objecting camp of the principle. Simmons, an opponent of the MR version of the principle, concentrates on beneficiaries rather than the goods in question. He exposes a fact about beneficiaries, on account of which Nozick's consent argument is alleged to fail to make a case against the principle of fairness.

In the very same light as Bell's defence, Simmons says that those who are, or are not, about to consent to the scheme are outside of the scheme, so consent does not affect the obligation of beneficiaries who are already in the

scheme.⁸ ‘One becomes a participant in the scheme precisely by accepting the benefits it offers. It seems clear that a man can accept benefits from a scheme, and be a participant in that sense.’ (Simmons 1979: 125-6) Thus, those who have voluntarily accepted benefits are considered as *members* of a cooperative scheme. When Nozick suggests consent as an objection to the fairness obligation, he means the consent of ‘outsiders’ of the scheme with whom both Hart and Rawls are not concerned, according to Simmons (ibid. 125). So those who want or do not want to consent to the scheme are, for Simmons, not considered by Hart or Rawls. By excluding those who are, or are not, to consent to the scheme, Simmons argues that the principle of fairness does not fall into the trap of Nozick’s consent argument.

1.2.4. Defence: pure public goods

As most defenders of the principle of fairness do, Arneson pays attention to the characteristics of the goods in question. Having pointed out that ‘the principle is plausible only if its application is restricted to particular types of benefits’ (Arneson 1982: 618), he distinguishes public goods from private goods, and divides public goods into pure public goods and collective goods. A collective good is a good that it is ‘impossible and extremely costly’ to prevent anyone from consuming while a pure public good is a good that all members of the group must consume. Pure public good entails collective good, but not vice versa

⁸ The difference between Bell’s and Simmons’ argument is that Bell’s beneficiaries are already the members of the scheme from the first while Simmons’ beneficiaries become the participants in the scheme by their voluntary act of benefiting.

(ibid. 618-9). Arneson makes a case for obligations on beneficiaries who take pure public goods.⁹ His basic idea is that ‘if the benefit is uncontroversially a benefit *for all*, if the division of its costs is fair, the individual beneficiary of an ongoing scheme is required to pay his dues’ (ibid. 633, italics added). With regard to pure public goods, Arneson insists upon the impossibility of rejection of pure public goods.

Notice that, once a pure public good is supplied to a group of persons, there cannot really be any voluntary acceptance or enjoyment of the benefit by individual consumers. One cannot voluntarily accept a good one cannot voluntarily reject. A person can choose not to watch a television program broadcast over the airwaves, but he cannot opt out of the security that a system of national defence provides (ibid. 619).

To return to Nozick’s PA example, if a person can opt not to hear the public address system, then the PA system is not a pure public good. Because pure public goods are goods that cannot be rejected, a scheme of cooperation for such goods is not one that can or cannot be consented to. In this way, Arneson tries to exclude the possibility of consent in generating the fairness obligation.

Arneson reinforces the focus on pure public goods, concerning political obligation. He emphasizes the indispensability of pure public goods by saying that people have no choice but to make use of pure public goods like military defence, police protection, and the rule of law (ibid. 619). Governments that supply these pure public goods have ‘legitimate authority over their citizens’

⁹ The goods applicable to the principle of fairness are discussed in detail in Chapter 5.

(ibid. 619). Arneson interprets Hart's cooperative scheme as a scheme that supplies pure public goods, and insists that people should be obligated to submit to government that provides them with such pure public goods. To support this insistence, he invokes Hobbes and Locke: 'neither Hobbes nor Locke would say a citizen is obligated to obey a government that fails to establish minimal conditions of personal security' (ibid. 619). On the basic assumption that pure public goods are worth the cost and that the distribution of the whole cost is fair, Arneson easily generates political obligation to obey the government that supplies such goods.

1.2.5. Defence: right entails its enforcement

There is a claim that Nozick's argument for consent is not realistic in a world where a right is not likely to be respected. Although '*it is true that rights do not entail rights of enforcement of the initial rights*', according to Macdonald, 'we unfortunately do not live in a world of morally serious persons who fulfil their obligation without its enforcement' (MacDonald 1984: 51-2, his *italic*). MacDonald finds Nozick's own theory of rights based on this realistic recognition of the world. Nozick's own idea of individual rights does include its enforcement, which can be exercised without others' consent; your rights restrict my behaviour and those restrictions do not depend upon my consent. In the same light, cooperators in the principle of fairness have a right to the compliance of beneficiaries and this right entails its enforcement without beneficiaries' consent to the rules.

1.2.6. Criticisms: no free-riding and no actual consent

Simmons gives an example in which a person can be obligated without consenting to a cooperative scheme. Jones, a free rider, does not want to join in digging a public well for water supply, but actually goes to the well and takes some water regularly (Simmons 1979: 127). He was not forced to join the scheme for a public well, and yet deliberately took the benefit produced by other cooperators. In this case, he did not consent to the scheme, but still has an obligation to make a contribution, 'which is not accounted for by a principle of consent, but precisely in terms of fair play' (ibid. 127). As a reason for the fairness obligation, Simmons rejects consent and takes seriously a basic idea of the principle of fairness: no free-riding.

In addition, Simmons suggests that citizens hardly consent to such schemes and just 'go along with' them and become bound to the rule:

In fact, I think that *most* participants in cooperative schemes do nothing which can be thought to constitute consent. Most participants in cooperative schemes simply 'go along with' the schemes, taking their benefits and carrying their burdens (ibid. 128, his italics).

So there is no actual consent by which citizens become members of a society and are to be obligated. It is hardly likely to consent to a cooperative scheme, according to Simmons.

1.2.7. Summary

Nozick makes a strong objection to the principle of fairness by arguing that there

cannot be any obligation because of benefits compulsorily given or unintentionally taken, in the absence of beneficiaries' consent to the scheme of cooperation.¹⁰ Against this, there are both defences and criticisms. Bell believes that it is not natural for individuals (not) to opt to consent to a scheme of cooperation because they are already participants in a social practice. This can be interpreted as a condition for the principle of fairness: beneficiaries' being participants in a cooperative scheme; this will be examined later as to whether it is necessary or not. According to Macdonald, it is not consistent for Nozick to reject the fairness obligation that derives from cooperators' right to the compliance of beneficiaries without their consent to the scheme while arguing for enforcement of individual rights without others' consent. Arneson points out the indispensability of pure public goods, a cooperative scheme to which it is impossible (not) to consent. Simmons argues that cooperators have already tacitly consented to a cooperative scheme by accepting benefits, and thus do not need to consent again to the scheme in order to be obligated. He also notes that there is no actual consent in an existing society. Simmons seems to depend on the 'no free-riding' idea and on voluntary acceptance in criticising the consent argument. Voluntary acceptance, however, is the key point of his limiting argument against the principle of fairness.

¹⁰ The consent argument might just as well be viewed as a rival theory of obligation rather than as a version of an objection to the principle of fairness. However, in defending the principle of fairness, I regard the consent argument as an objection to the principle and try to rebut it in Chapter 6. When I apply the principle to the issue of global climate change in Chapter 7, I discuss the consent argument as a rival theory of obligation.

1.3. THE LIMITING ARGUMENT

As we have seen, Simmons criticises the consent argument and holds that beneficiaries should be obligated in return for their benefit that is voluntarily accepted. For this reason, he looks to be supporting the principle of fairness on the basis of the idea of ‘no free-riding’. However, having made a criticism of the consent argument, he maintains the limiting argument as an objection to the principle of fairness. This states that beneficiaries should be obligated only to the extent of their voluntary benefit. The limiting argument is similar to the consent argument in the sense that both arguments put emphasis on the intention of beneficiaries. However, while the consent argument pays attention to beneficiaries’ consent to a cooperative scheme, the limiting argument focuses on their voluntary acceptance of goods from the scheme.

In the following I observe the limiting argument by Simmons, Miller and Sartorius, Greenawalt, and a defence by Klosko, of which Wolff makes a criticism. Klosko also tries to defend himself against Wolff’s criticism. As pointed out above, the limiting argument makes use of voluntary acceptance while Klosko’s defence points to the characteristics of the goods in question. Unlike other critics of the principle, Wolff focuses on the variety of the goods that government provides. The strongest limiting argument is raised by Carter, an anarchist, who rejects Klosko’s idea that it is better to be obligated than to be lawless.

1.3.1. Objection: no general theory

Simmons's strategy, as with other objections to the principle, is to point out a problem with the intention of beneficiaries. According to him, the principle of fairness is unable to produce a general theory that can bind all beneficiaries of a scheme because, according to the principle understood by him, beneficiaries who merely, not voluntarily, receive benefits are not bound to do their part. By highlighting voluntary acceptance, Simmons maintains that 'individuals who have merely *received* benefits from the scheme have the same status relative to it as those who have been unaffected by the scheme' (Simmons 1979: 125, his italics). In this sense, he agrees on the necessity of voluntary acceptance in generating an obligation.

However, the problem is, Simmons continues, that there are, as a matter of fact, few benefits that can be voluntarily accepted in a real political community. He says that most benefits produced by a cooperative scheme are 'open' in the sense that people cannot avoid receiving them 'without a considerable inconvenience', and thus 'open' benefits are mostly received without any special intention to accept them, which is crucial in binding beneficiaries (ibid. 130-1).

Briefly thus: first, only those who voluntarily accept benefits are to be obligated to do their fair share; second, benefits to be assigned are too 'open' to be voluntarily accepted. Thus, Simmons concludes, the principle of fairness based upon voluntary acceptance cannot be generally applied to every single member of the scheme because not every member voluntarily accepts 'open benefits'.

1.3.2. Objection: reduced applicability

Voluntary acceptance limits the principle of fairness within those who *voluntarily accept* benefits while excluding those who *merely receive* benefits, according to Simmons (1979: 125). In order to give clear extent to which the principle of fairness is intelligible, he defines voluntary acceptance of benefits.

We can take *open* benefits willingly and knowingly. But doing so involves a number of restrictions on our attitudes toward and beliefs about the open benefits we receive. When we take open benefits willingly and knowingly, we can neither regard the benefits as having been forced upon us against our will, nor think that the benefits are not worth the cost. Thus, if we do want to accept open benefits, we must understand that the benefits *are* provided by the cooperative scheme in order to accept them (ibid. 132, his italic).

Voluntary acceptance of benefits in this strict sense, however, ‘significantly reduces the number of individuals who receive open benefits, who can be taken to have [voluntarily] *accepted* those benefits’ (ibid. 132). In particular, Simmons holds, most citizens do not *consciously* accept public benefits from government. ‘Many citizens barely notice (and seem disinclined to think about) the benefits they receive’ (ibid. 139). When citizens live in a country, they hardly recognise that they are getting benefits like ‘national security, police protection, and public order by law’. Miller and Sartorius support this argument too; ‘although one can incur obligations by the voluntary acceptance of benefits provided by others, the cases in which one can do so are much more limited than is usually recognized’ (Miller & Sartorius 1979: 166).

In addition, people do not think public benefits are worth the burden they are supposed to share (Simmons 1979: 139). Simmons says,

faced with high taxes or unreasonably restrictive laws governing private pleasures, citizens believe that the benefits received from government are not worth the price they are forced to pay (ibid. 139).

Thus there are only a few citizens who voluntarily accept the benefits of government from the political cooperative scheme. So, 'the fair play account of political obligation will not be suitably general in its application, even within democratic states' (ibid. 139). Through the limiting argument Simmons arrives at the conclusion that there are no citizens in actual states who voluntarily accept public benefits and have a political obligation.

In the same light as the argument by Simmons, Greenawalt points out the limited scope of the fairness obligation.

An individual may believe laws do benefit him, but conclude that the share demanded is too great. In this event, his willing acceptance of open benefits goes only so far as what he thinks his fair share for the benefits is. The duty of fair play compels him to contribute only that much' (Greenawalt 1984: 761).

For Greenawalt, the principle of fairness should impose obligations only to the extent to which people benefit. There are only a few benefits about which one has a really free choice in the political context, he claims (ibid. 756). Some benefits are accepted voluntarily while most other benefits are arbitrarily given

or forced upon us. So, the acceptance of a few benefits by choice is not sufficient to bind beneficiaries to an obligation to obey *all or most* laws. In sum, we are obligated in so far as we voluntarily accept benefits, but there are only few public benefits that we are free to choose, so we have little political obligation to comply with *all or most* laws.

1.3.3. Defence: indispensability of benefits

The limiting argument seems to have power in limiting the applicability of the principle of fairness. However, the limiting argument is not powerful enough to reject Rawls' version of the principle of fairness at least as that is already conditioned by voluntary acceptance of benefits. Furthermore, there are some defences of the Hart's version of the principle on the basis of *mere receipt* of benefits.

Arneson (1982) firstly tried first to defend the principle against the limiting argument. According to him, it is impossible and unnecessary to voluntarily accept pure public goods, of which 'all members of the group must consume the same quantity' (Arneson 1982: 618-21). In a similar sense, Maphai rejects the distinction between voluntary acceptance and mere receipt of public benefits. According to him (Maphai 1987: 75-6), it is irrelevant to distinguish between 'voluntary acceptance' and 'mere receipt' of benefits in discussing the principle of fairness that concerns *public benefits*, which cannot be accepted or rejected. Dagger, in the same vein, takes the position that it is hard to distinguish between 'acceptance' and 'receipt' of benefit because people receive *and accept* benefits without knowing that they are benefits (Dagger 1997: 74). Penrose

understands ‘voluntary acceptance’ in a different sense. He points out that Simmons makes an ‘excessively subjectivist interpretation’ of voluntary acceptance; non-voluntary acceptance of benefit does not mean that we do not accept benefit willingly and knowingly (Penrose 2004: 287-8). While Dagger and Penrose understand the concept of voluntary acceptance of benefit in their own specific ways, Arneson and Maphai find that voluntary acceptance is impossible because of the characteristics of public benefit. Klosko explores the benefit in question in detail in order to repudiate voluntary acceptance itself.

Klosko focuses on the indispensability of benefits provided by government, which draws out three conditions of the principle to go with the other two: benefits being worth burdens and fair distribution of benefits and burdens (Klosko 1992: 39). He calls the benefits of government ‘*presumptively beneficial public goods*’ (*presumptive public goods*), which are ‘necessary for an acceptable life for all members of the community’ (ibid. 39). Klosko’s favourite example of presumptive public goods is ‘physical security comprised mainly of national defence and law and order’ (ibid. 40). He says that an individual needs physical security ‘regardless of whatever else he needs’ (ibid. 40), that ‘the benefits of national defence are unavoidable as well as nonexcludable’ (ibid. 41), and that ‘because of the indispensability of national defence, it would not be rational for him to choose otherwise, and he could not say that he does not want them’ (ibid. 42).

On the basis of these facts, Klosko counters Simmons’ claims that A) individuals should not be forced to receive benefits, and that B) beneficiaries should ‘know’ that the goods are products of cooperative schemes. On the claim

that benefits must be wanted by recipients, Klosko notes that ‘presumptive public goods can be presumed to be beneficial [even] without taking the recipients’ view into account’ (ibid. 51). To the second claim on the consciousness, he contends that ‘because A will receive nonexcludable goods whether or not he pursues them, it is less likely that his not knowing their origin will affect this conduct in their regard’ (ibid. 51). That is, regardless of the willingness and the consciousness of the recipients, they need and do receive the benefits. In addition, if citizens receive benefits from cooperators’ effort, they acquire obligations to the scheme, according to a basic idea of the principle of fairness: no free-riding. Giving three examples of ‘hostile territories, violent crime, and air pollution’, Klosko maintains that

as long as the benefits in question can be presumed to be sufficiently large because of obvious facts of human existence, someone who receives them from a cooperative scheme does indeed incur an obligation to contribute, without regard to particular attitudes or beliefs (ibid. 52).

He concludes that ‘the indispensability proviso greatly simplifies the imposition of obligations upon non-agreers’ (ibid. 49).

Whereas Arneson suggests mere receipt of benefit as a reason for binding beneficiaries, in addition to voluntary acceptance, Klosko argues only for mere receipt in order to overcome the limitation of voluntary acceptance. According to him, because ‘presumptively beneficial public goods’ are indispensable for life, people need them regardless of whether they want them or not (Klosko 1992: 39-42). Klosko finds the reason for an obligation to contribute

in mere receipt of indispensable benefits. Although they have different purposes, both Arneson and Klosko support the indispensability of benefit as a reason for an obligation on beneficiaries. So we add another condition for the principle of fairness:

Condition 5: Indispensability of benefit

Although Klosko does not expose the fundamental idea of the principle, we can find a clue to it. He is depending on the fundamental idea in defending the principle of fairness. He shows that, when he answers a possible objection that by not cooperating A would not be doing any harm (ibid. 42). Klosko replies, ‘Their [cooperators] complaint is not that he would be harming them but that in refusing to cooperate he would be behaving unfairly’ (ibid. 42). To put it differently, beneficiaries have an obligation to contribute in return for their benefit because it is fair to do so, which is the basic idea of Hart’s version of the principle.

1.3.4. Objection: not every benefit is indispensable

According to Wolff, there are actually various different roles the state plays and not everyone does actually want ‘presumptive public goods’ provided by the state, so ‘obligations are generated for an individual only if an individual receives a *net* benefit according to his or her subjective scale of valuation’ (1995: 96, his italics). In other words, arbitrary provision of presumptive public goods

by governments can force citizens to accept unwanted goods because the goods of governments are not always what ‘everyone actually does want’ (ibid. 94). As long as citizens do not want the whole pack of public goods provided by government, Wolff argues, they should not have any ‘universal political obligation’. ‘The principle of fairness can, at best, justify only a part of the state’s functions, and other arguments are necessary to justify other aspects of the state’s behaviour’ (ibid. 97). Accordingly, for Wolff, Klosko’s idea of the indispensability of public goods applies *to only a part* of the goods government provides in an actual state.

1.3.5. Defence: indirectly indispensable

Klosko admits that there are some public goods which are not directly indispensable for an acceptable life of all citizens. He calls such public goods ‘*discretionary public goods*’, which are ‘desirable but are not presumptively beneficial’ (Klosko 1992, 44), and which citizens can easily dispense with. Every citizen does not need all discretionary goods supplied by government such as ‘transportation, communication facilities, public health, public education, the stability of the overall economy’, and so forth.

Nonetheless, Klosko argues that citizens do have an obligation to contribute to the production of such goods. According to his indirect argument (ibid. 86-95), presumptive public goods, in return for which citizens have an obligation, cannot be practically provided without providing discretionary goods. Klosko argues:

A basic societal infrastructure, the individual components of which are not themselves presumptively beneficial, is necessary for a functioning society and so for the provision of presumptive public goods. Though highways, railroads, airports, bridges, and harbors are not themselves presumptively beneficial, it is difficult to imagine how a country could maintain an adequate level of national defense without them' (ibid. 88).

The point of the indirect argument is that discretionary public goods are indispensable for the provision of presumptively beneficial public goods, which are indispensable again for an acceptable life of all citizens. In sum, for Klosko, public goods supplied by government are indispensable for an acceptable life of all citizens both directly (presumptively beneficial public goods) and indirectly (discretionary public goods), so the recipients of such goods are obligated, for the sake of fairness, to make a contribution in return.

1.3.6. Defence: regulated provision of benefits

To the criticism that not all indispensable benefits bring about the fairness obligation, Mapel highlights an important aspect of them that Klosko added in his later article (1998: 65):

presumptively indispensable goods can only be produced by "regulated coordination", that is, by the complex coordination of large numbers of people by means of law (Mapel 2005: 432).

When and if indispensable goods are provided by the compliance of cooperators with the law of a particular state, according to Mapel, the recipients of the goods

are under a political as well as a moral obligation to obey the law. This argument implies that even though beneficiaries benefit from a cooperative scheme without intention to benefit, they have an obligation to follow the rules of the scheme as long as the goods in question are produced by means of the law that governs the scheme. Here is another condition the principle of fairness may need to satisfy for its eligibility as a theory of (political) obligation.

Condition 6: Provision of the goods in question by means of law

1.3.7. Objection: an anarchist point

No matter whether indispensable or dispensable, an anarchist totally rejects public benefits from government and tries to make the principle of fairness altogether unavailable. Carter (2001) projects himself into an anarchist called Pickerel and denies every government benefit to be at all beneficial to citizens. From national defence through law and order to basic bodily needs, he is convinced that they are exploitative rather than beneficial (especially for the poor). Carter's reasoning is based on what he calls 'state-primacy theory' that explains how a state strengthens its own power and control over citizens. Briefly speaking, according to 'state-primacy theory', every government benefit is a means by which government reinforces its legitimacy to control citizens' lives (Carter 2001: 231-233). Law and order, for instance, are considered as 'protection for the rich and coercive apparatuses by which the poor are prevented from redistributing the wealth of the rich' (ibid. 234-235). Thus, an anarchist is

not convinced that what is provided by government is a benefit at all.

1.3.8. Summary

There are a number of objections and defences concerning the limiting argument. The main point of the limiting argument is that people hardly ever accept public benefits voluntarily, so the principle of fairness applies to a very limited extent. Most defences against the limiting argument point out the impossibility or irrationality of rejecting public benefits that are essential for a decent life. We have found another condition for the principle of fairness from Klosko's defence: indispensability of benefit. On the other hand, an anarchist challenge goes further than other limiting arguments. Carter, an anarchist, believes that public benefits supplied by governments are exploitative rather than indispensable in the sense that public benefits such as national defence, law, order, and so on are not working for the poor but for the rich who support government for its supply of such benefits.

1.4. THE UTILITY ARGUMENT

In addition to the consent argument and the limiting argument against the principle of fairness, there is a third argument, which I call *the utility argument*. This is associated with mainly M. B. E. Smith. We can also find the general idea of the utility argument in Nozick and Simmons. Those who make the utility argument place emphasis on the worth of benefit in proportion to the cost. They

are more interested in the utility of (non-)cooperation than fairness itself. Against the utility argument, there are two kinds of defence: criticism of the reduction of fairness to utility (Lyons and Dagger); and the greater utility of the fairness obligation (Klosko).

1.4.1. Objection: no benefit, no harm, no problem

Smith's basic idea is simply that 'the obligation of fair play governs a man's actions only when some benefit or harm turns on whether he obeys' (Smith 1973: 957). According to this idea, it is fair even to free-ride if the compliance with the rules of a cooperative scheme does not benefit other members of the scheme, or if the non-compliance does not harm others, i.e., if cooperators are not made worse off by the non-compliance. Dagger calls this idea 'no benefit, no harm, no problem' (Dagger 1997: 70). The following is from Smith.

Surely, the fact that *A* has benefited from *B*'s submission does not give *B* the right to insist that *A* obey when *B*'s interests are not affected. *A* may in this situation have an obligation to obey, perhaps because he has promised or because his disobedience would be unfair to some other member; but, if he does disobey, he has surely not been unfair to *B* (Smith 1973: 956).

To follow this utility argument, it is not fair to obligate free-riders if their compliance does not benefit others, or if their non-compliance does no harm to others. It is fair for free-riders to be obligated to the rules of cooperation only if being obligated benefits others, or if not being obligated does any harm to others.

It is noteworthy that the utility argument is different from utilitarianism as it is understood as a moral or political theory. Utilitarianism holds that actions are right when they produce ‘the greatest happiness of the greatest number’. That is, the greatest possible number of individuals should be happy to the greatest possible extent. However, the utility argument as it is understood in the context of the debate over the principle of fairness maintains that free-riding is not unfair when/because it does not diminish the existing overall benefit enjoyed by cooperators. The utility argument against the principle of fairness should be distinguished from utilitarianism in general.

1.4.2. Defence: no concept of fairness

As it would be expected, the utility argument is accused of lacking a concept of fairness. Smith does not say that free-riding with no harm or no benefit to others is fair, but *not unfair*. For him, if free-riding does no harm, it is *not unfair*; if the compliance makes no benefit to others, the non-compliance is *not unfair*. This involves no concept of fairness such that a burden should follow a benefit or that there should be equal distribution of burden between beneficiaries. For this reason, Smith overlooks ‘the consideration that itself underlies the notion of fairness: the conviction that everyone involved in a practice is to be treated as an equal’, according to Dagger (1997: 71). Dagger continues:

this holds even when the interests of the parties involved are not affected, directly or indirectly, for *one may be wronged (deceived, treated unfairly) without being harmed*. Those who refuse to cooperate in a practice while they accept its benefits are acting unfairly and wronging those who do

cooperate' (ibid. 71, his parentheses, my italics).

As mentioned earlier, according to Klosko, cooperators complain about an action of free-riding not because a free-rider is harming them but because he is behaving unfairly (1992: 42). 'We need not suppose that unco-operative (or unfair) behaviour is not harmful', Lyons points out, and 'it can be disastrous in its long-range effects' (Lyons 1965: 172). As Simmons' example of a free-rider shows, Jones who, without consent to join the cooperative scheme for a public well, takes some water from the well that has been dug by other cooperators, does not harm other cooperators by taking water from the well. The reason why he is accused of unfairness, nonetheless, is that he takes the benefit without contribution while other cooperators have put in their effort to obtain the water.¹¹

1.4.3. Objection: no obligation more than benefit

There is a weak utility argument against the principle of fairness. According to Nozick, it is not fair to impose an obligation on an individual, which is heavier than her benefit (Nozick 1974: 94). To take his PA example: if your one day's service in your turn is more valuable than the days you enjoy from others' service, you are not to be bound to take your turn. In other words, it is not fair for you to be required to pay more than you benefit.

¹¹ I do not get involved in rejecting the utility argument until Chapter 6, where I offer a fuller reply to the utility argument.

1.4.4. Defence: benefited enough to be obligated

Klosko dismisses Nozick's examples because the benefits in the examples are only *discretionary goods* that are 'desirable but not presumptively beneficial' (Klosko 1992: 44). He points out that the benefits in Nozick's examples are 'nebulous or relatively insignificant or not of great value' (ibid. 44-5). The principle of fairness is not concerned with the goods that are desirable or not simply according to the preferences of beneficiaries. If benefits are public goods that are *indispensable* for all, Klosko believes, it is worth being obligated in order to obtain such goods. As long as public goods are indispensable, you cannot pay more than you benefit because they are worth the cost of them.

Klosko does not present his own version of the principle of fairness. However, putting emphasis on the indispensability of benefit, he sets out three conditions for the principle (1992: 39);

The principle of fairness is able to generate powerful obligations to contribute to nonexcludable schemes if three main conditions are met. Goods supplied must be (i) worth the recipients' effort in providing them; (ii) 'presumptively beneficial'; and (iii) have benefits and burdens that are fairly distributed.

Having concentrated on the characteristics of the goods in question, Klosko tends to derive the fairness obligation from the idea that an obligation should follow the receipt of the goods, not from the fair relation between beneficiaries and cooperators. As regards conditions for the principle, condition (ii) indicates our condition 6: the indispensability of benefit, while condition (iii) reminds us

of our condition 3: the justice of a cooperative scheme. Against the utility argument that the benefit may not be worth the cost, Klosko puts condition (i) holding that presumptive beneficial public goods are worth the cost, or the cost is cheaper than the value of the loss of the public goods. With the indispensability of benefit in mind, he says that ‘because of their enormous value, these goods justify significant sacrifices on the part of all community members’ (Klosko 1992: 54). For example, even though a soldier faces some risk in his military service, ‘this is less than he would face if national defence were not provided’ (ibid. 55). At any rate, ‘with condition (i) not satisfied, they [beneficiaries] would not have the fairness obligations to serve’ (ibid. 55). Klosko thus presents another condition for the principle with regard to the relationship between benefit and the cost of it:

Condition 7: Benefit being worth the cost of it

1.4.5. Summary

The strong version of the utility argument rejects the fairness obligation unless the compliance with the rules of a cooperative scheme benefits others or the non-compliance harms them. The weak version claims a reduction of the fairness obligation to the extent that beneficiaries benefit from the scheme. The strong version is accused of lacking a conception of fairness because it reduces fairness to utility. The weak version is told that public benefits are so valuable that beneficiaries cannot be obligated more than they benefit.

1.5. CONCLUSION: BASIC IDEAS AND CONDITIONS

According to the principle of fairness, it is fair to obligate beneficiaries to do their share in return for their benefit produced by the sacrifice of cooperators. Since the principle was introduced by Hart and Rawls, there have been a number of defences as well as objections: these concern in the main the consent argument, the limiting argument, and the utility argument. This chapter has reviewed the debate on the principle so as to understand the principle in an overview. More importantly, in the process of the review, basic ideas of the principle and its candidate conditions have been identified for later work on a full elaboration of the principle.

The original idea of the principle of fairness is ‘mutuality of restrictions’ according to which beneficiaries should make a contribution to the scheme of cooperation from which they benefit as cooperators have restricted their liberty for the scheme. It is fair to treat similar individuals similarly. However, beneficiaries should make a contribution in the other sense as well; they should contribute simply in return for their benefit. That is, it is fair to allow no free-riding. While the principle based on both basic ideas requires beneficiaries to contribute to the scheme of cooperation for fairness between them and cooperators and for reciprocity between benefit and burden, the principle is required to meet a number of conditions, which are suggested by defenders or critics of the principle. To put basic ideas and conditions all together:

BASIC IDEAS

- Mutuality of restrictions
- No free-riding

CONDITIONS

- Restrictions of the liberty of cooperators
- Voluntary acceptance of benefit
- Justice of a cooperative scheme
- Beneficiaries' being participants in cooperation
- Indispensability of benefit
- Provision of the goods in question by means of law
- Benefit being worth its cost

As it was announced earlier, this review of the debate has neither entered into the debate nor examined the validity of each objection and defence. Rather, basic ideas of the principle and candidate conditions to be met have been collected for later work on a full construction of the principle. This is because it is the correct procedure to develop comprehensively the principle itself before going on to examine the validity of objections to and defences for the principle.

Even though 'mutuality of restrictions' and 'no free-riding' have been exposed as basic ideas of the principle of fairness, they are still to be explored in more detail so that the principle can be morally established. In addition, every candidate condition is to be analysed in depth to discover which ones are the conditions that the principle should satisfy in order to work as the basic ideas require. These are the tasks to be performed in the following chapters.

2. MORAL FOUNDATIONS OF THE PRINCIPLE OF FAIRNESS I: THE RIGHT OF COOPERATORS

A harms B if A's acting is indefensible,
that is, neither excusable nor justifiable.

(Feinberg 1990: 26)

2.0. INTRODUCTION

The last chapter has identified two basic ideas of the principle of fairness: 'mutuality of restrictions' and 'no free-riding'. The idea of no free-riding will be dealt with in conjunction with the study of fairness as reciprocity that is presented as the fundamental moral basis of the principle of fairness in Chapter 4. This and the following chapter will examine 'mutuality of restrictions'.

Hart, the original proponent of the principle, suggests 'mutuality of restrictions' as the source of the fairness obligation on beneficiaries; cooperators, who have complied with the rules of a cooperative scheme, have a right to the compliance of beneficiaries because it is fair to restrict mutually the freedom of both cooperators and beneficiaries. 'Mutuality of restrictions' as a moral foundation of the fairness obligation can be understood in two ways. One is what I call *the fair right thesis* that the fairness obligation to be imposed on beneficiaries derives from the right of cooperators not to be disadvantaged. The other is what I call *the fair equality thesis* that beneficiaries should equally fulfil

the fairness obligation as cooperators have complied with it, so as to achieve equality between the parties.

Leaving the fair equality thesis for the following chapter, this chapter examines the fair right thesis, i.e., whether the right of cooperators can justify the fairness obligation to be imposed on beneficiaries. To illustrate the fair right thesis by example, it is because others who pay for a TV licence have the right to one's payment that one is obligated to pay for a licence¹². That is, the fairness obligation on beneficiaries stems from the right of cooperators which is obtained as a result of their compliance with the rules of a cooperative scheme that produces the goods for beneficiaries.

There are two tasks for the fair right thesis to perform for its main argument. One is to explain how cooperators obtain a right to the compliance of beneficiaries while the other is to clarify the conditions under which that right of

¹² In the UK, there is freeview TV and cable or satellite TV. One needs a subscription to watch cable or satellite TV while it requires only a TV licence to watch freeview TV channels. The principle of fairness applies to the cases of freeview TV since there is no subscription needed. That is, people cannot be stopped from receiving freeview TV without buying a licence if they have a TV, while cable or satellite TV is excludable to non-subscribers. All are non-rival in their consumption. By a TV I mean freeview TV which is non-excludable as well as non-rival. The principle of fairness applies to transactions of the goods that are technically non-excludable in their provision but not necessarily non-rival in their consumption. I use this TV example because of its simplicity. Thus, it needs to be noted that the TV is not what Arneson calls a pure public good because it is not impossible to exclude, not completely though, individuals from enjoying it without paying; the TV licence authority can impose a fine on those who watch TV without a licence. I just suppose that the TV is not excludable for the sake of argument. The goods in the question of the principle of fairness are discussed in detail in Chapter 5.

cooperators triggers an obligation for beneficiaries to comply with relevant rules. For the first task, the fair right thesis refers to the interest theory of rights, which holds that if A is disadvantaged by an act of B, then A obtains a right to B's obligation not to do the act that disadvantages A. Thus, the fair right thesis has three premises to establish its ultimate argument that beneficiaries have an obligation to comply with relevant rules: (1) cooperators are disadvantaged by the non-compliance of beneficiaries; (2) when cooperators are disadvantaged by the non-compliance of beneficiaries, they obtain a right to the compliance of the latter; (3) when they obtain a right to the compliance of the latter, the latter come under an obligation to comply with relevant rules.

The chapter runs as follows. Section 2.1 presents the fair right thesis as a way of understanding 'mutuality of restrictions'. The interest theory of rights is suggested as a fundamental support for the fair right thesis in Section 2.2. A counter-argument, the no disadvantage argument is introduced in Section 2.3. The chapter develops the debate between the fair right thesis and the no disadvantage argument in Section 2.4. It concludes that there is a point at which cooperators are disadvantaged by the non-compliance of beneficiaries. The following Section, 2.5, examines whether it can be established that when cooperators are disadvantaged by the non-compliance of beneficiaries, the former obtain a right to the compliance of the latter. The conditions under which the right of cooperators brings about an obligation for beneficiaries to follow relevant rules are clarified in Section 2.6. The argument through the chapter is specified in the concluding Section, 2.7: the natural duty has priority over the right of cooperators to the compliance of beneficiaries. To state the main

argument of the chapter briefly, beneficiaries are required to do their share in return for their benefit in order not to infringe on the right of cooperators not to be disadvantaged by their non-compliance, *supposed* that beneficiaries have a duty not to illegitimately damage the interest of cooperators.

2.1. THE FAIR RIGHT THESIS

According to Hart, cooperators who comply with the rules of a cooperative scheme have the right to the compliance of beneficiaries who benefit from the compliance of the former. ‘The equal distribution of restriction and freedom’ can be achieved, he says, by restricting the freedom of beneficiaries who benefit from the restriction of the freedom of cooperators (Hart 1955: 191). In other words, because cooperators submit themselves to the requirements of a cooperative scheme, they have the right to require beneficiaries who enjoy the fruit of the scheme to submit to the same requirements. In this light, the fair right thesis derives an obligation for beneficiaries to comply with the rules of a cooperative scheme from the right of cooperators who comply with the rules of the scheme that makes the goods in question available to the former.

It is worthwhile to read again Hart’s outline of the case in which the fair right thesis plays a fundamental role.

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those

who have benefited by their submission (Hart 1955: 185).

Here we can see the restriction of cooperators' freedom being levelled against that of beneficiaries'. By counterbalancing the restriction of freedom between cooperators and their beneficiaries, Hart pursues 'an equal distribution of restrictions and so of freedom among this group of men' (ibid. 191).

Hart suggests 'mutuality of restrictions' as a third source of special rights and obligations which is distinguished from promise and consent one freely promises and gives consent to create rights and obligations. 'Mutuality of restrictions' is not a means by which an obligation is deliberately incurred, but a requirement to which it is fair to refer (ibid. 183-6, 190-1). When Hart says that 'not all obligations to other persons are deliberately incurred, though I think it is true of all special rights that they arise from previous voluntary actions' (ibid. 185), he distinguishes the fairness obligation from other obligations by promise and consent by virtue of the source of their generation; the fairness obligation is supported by the moral requirement that it is fair to bind mutually both parties while other obligations arise as a result of one's own voluntary action.

Being based on the idea that it is fair to bind mutually both parties, the fair right thesis means that the fairness obligation to be imposed upon beneficiaries is *due to the right* that cooperators gain from their submission to the rules of a cooperative scheme. Hart writes:

But the moral obligation [for those who benefit] to obey the rules in such circumstances is *due to* the co-operating members of the society, and they [cooperators] have the correlative moral right to obedience (Hart 1955:

185, original italics).

In other words, beneficiaries of the effort made by cooperating members have an obligation to contribute to the scheme, which corresponds to the right of the cooperators. When people cooperate together in order to set up national security by abiding by relevant rules, those who benefit from national security have an obligation to conform to the same rules, an obligation corresponding to the right of the cooperators, the right to the compliance of beneficiaries.

There are at least two aspects of the right of cooperators that is supposed to be the source of the fairness obligation. First, the right of cooperators correlates with a special obligation, not a duty in general.¹³ This simultaneously means that *an obligation* is owed to specific persons (Hare 1981: 152) while *a duty*¹⁴ is owed to anyone with a natural or social identity. Jane, who has made a promise to John, has an obligation to keep the promise, which immediately means that John has a right that the promise be kept. On the other hand, one has a *duty* to respect the life of others, which does not necessarily imply that others have the right to require one to respect their life.¹⁵ Beneficiaries come under the

¹³ For a more detailed comparison between obligation and duty, see Lemmon (1962), Brandt (1964), Simmons (1979: 11-16), Hare (1981: 151-153), White (1984: 52-3).

¹⁴ Fishkin calls duty of this sense ‘general obligation that is owed by anyone to anyone’ (Fishkin 1982: 27).

¹⁵ One’s right to life may result in others’ *duty* to respect one’s life. In this sense, Raz (1986) argues for the right-based morality or moral *duty*. He argues that ‘the interest of the right holder is sufficient reason to hold another to be subject to a *duty*’ (ibid. 189, italics added), but points out that ‘a right to personal security [interest] does not require others to protect a person from all accident or injury [obligation]’ (ibid. 171). That is,

fairness obligation, an *obligation* that arises as a result of the fact that cooperators gain the right to the compliance of beneficiaries when the latter benefit from their compliance with the rules of the scheme of cooperation. That is, the fairness obligation to be imposed upon beneficiaries is not a *duty* owed to everyone but an *obligation* owed to particular people, that is, cooperators who comply with the rules of a cooperative scheme that makes the goods in question available to beneficiaries.¹⁶

Second, the right of cooperators has to be a *claim-right*¹⁷ that correlates with a corresponding obligation. Should the right of cooperators be the source of the fairness obligation, it has to be a reason for, and necessarily be followed by, the latter. Cooperators gain the right as a result of their submission to the scheme of cooperation that provides beneficiaries with the goods in question. This is, according to the fair right thesis, why beneficiaries should come under the fairness obligation to do their share in producing the goods. The right of

what Raz argues for is that ‘rights ground *duties*’ (ibid. 186, italics added), not that rights always ground *obligations*. Therefore, the right-based justification of the fairness *obligation* is different from the right-based *morality* of Raz.

¹⁶ For more understanding of the relationship between rights and obligations (duties), see Hohfeld (1919), Lyons (1970), Feinberg (1973: 61-4), White (1982; 1984, ch5), Waldron (1984: introduction), and Jones (1994).

¹⁷ A good guide to understanding of the concept of claim- right is Jeremy Waldron’s Introduction to *Theories of Rights* edited by him in 1984 and Peter Jones’ book, *Rights* (1994) although they benefit from Hohfeld’s earlier analysis of the concept in 1919, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. White (1984) also gives a general and useful understanding of the concept. For an analysis of the correlativity between rights and obligations (duties), see Hohfeld (1919), Feinberg (1966; 1973: 61-4), Lyons (1970), White (1984: ch5), Waldron (1984: introduction), Raz (1986: 170-1), Jones (1994), and Zimmerman (1996: 176-180).

cooperators is a reason for the fairness obligation on beneficiaries and also it brings about the latter. Once cooperators acquire the right to the compliance of beneficiaries, it follows that beneficiaries should come under the fairness obligation as a counterpart to the right of cooperators.

The summary argument is this. On the basis of the idea that it is fair to bind mutually both cooperators and beneficiaries, the fair right thesis claims that an obligation for beneficiaries of a cooperative scheme to do their share derives from the right of cooperators who complied with the rules of the scheme. This obligation is due to the right of cooperators, which must be a claim-right that corresponds with an obligation. However, the fair right thesis still needs to show how cooperators obtain the right to the compliance of beneficiaries, in addition to which it should clarify the conditions under which the right of cooperators brings about an obligation for beneficiaries to follow relevant rules.

2.2. THE INTEREST THEORY OF RIGHT

In order to achieve the first task for its main argument, the fair right thesis can appeal to the idea that cooperators have a right not to be disadvantaged by the non-compliance of beneficiaries. This idea is the main part of the interest theory of right, according to which when and if cooperators are disadvantaged by the non-compliance of beneficiaries, the former acquire a right to the compliance of the latter.

One may point out that Hart does not endorse the interest theory of right

but the choice theory of right.

The right holder may waive or extinguish the duty or leave it in existence... he may waive or extinguish the obligation to pay compensation to which the breach [of a duty] gives rise (Hart 1982: 184).

It is true that Hart argues for the choice theory of right against the interest theory of right. When cooperators have a right to the compliance of beneficiaries in such circumstances, the former is in the position to choose between waiving and commanding the obligation of the latter to follow relevant rules; the former's choice of commanding is the source of the obligation of the latter.

That is, the choice theory of right is clear about the *contents* of the right in question. However, with regard to the fair right thesis as a moral justification of the fairness obligation, I do not take a stand on whether the *content* of the right of the cooperators is interested-based or choice-based. Thus, it does not matter that cooperators can choose to cancel or command the obligation of beneficiaries to do their share.

What is important is to distinguish between a conception of the content of a right and the appeal to rights as a justification of the fairness obligation. The choice theory suggests a conception of the content of a right, which asserts that a right consists in the holder having a choice with respect to whether another has a duty to perform a particular act. As a conception of the content of a right, the interest theory holds that it is possible in some cases for others to have a duty to perform a particular act regardless of the choice of the person to whom the duty is owed. I do not take a stand on this dispute.

What matters to the discussion of the moral foundation of the principle of fairness is whether the interest theory or the choice theory can morally support the fair right thesis as a justification of the fairness obligation. However, it is not clear whether the choice theory of right justifies the right of cooperators with reference to the choice of the cooperators while it is clear that the interest theory of right appeals to the interest of cooperators. Hart finds the moral foundation of mutuality of restrictions in ‘the equal right of all men to be free’ (Hart 1955: 175, 191), which does not directly refer to the choice of the right-holders, but rather equality among all men. Equality as a moral foundation of the fairness obligation will be discussed in the following chapter. The current chapter focuses on the interest theory of right as a bolster of the fair right thesis because the only plausible argument about the right of cooperators is that the non-compliance of beneficiaries would disadvantage cooperators.¹⁸

The interest theory of right basically holds that it is the interest or benefit of the right-holders that justifies the corresponding obligation on others (Raz 1986, ch7). For example, children have a right to public education because they have an interest in having such an education; the interest of children justifies the parental and social obligation to provide them with public education.¹⁹ To put in our language, cooperators have the right to the compliance of beneficiaries

¹⁸ I do not mean to say that Hart takes the position of the interest theory of rights with regard to the moral foundation of the fairness obligation. However, I suggest the interest theory of rights as an understanding of ‘mutuality of restrictions’.

¹⁹ The interest theory of right is well explained in comparison with the will theory of rights by Sumner in his book, *The Moral Foundations of Right* (1987: 45-53), and also in the three authored book, *A Debate over Rights* by Kramer, Simmonds, and Steiner (1998).

because the former would benefit from the compliance of the latter.

However, not every beneficiary is an interest-right-holder, but vice versa. That is, an interest-right-holder is a beneficiary (Kramer 1998: 67). Interest is not a condition for, but an important function of, a right in the interest theory of right. A right functions in the way that the right holder benefits from having such a right or that the holder gets disadvantaged from the absence of the right. Thus, the interest theory of right can be stated in either a positive or a negative mode. The right of cooperators to the compliance of beneficiaries is based on the interest stemming from having the right or the disadvantage coming from not having the right.

The interest right thesis in a negative mode is similar to White's reciprocity principle; both concern the disadvantage that cooperators may experience when beneficiaries do not comply with relevant rules. According to White's reciprocity principle, one has a duty to do one's share in return for benefit received from others' cooperation; otherwise others are burdened beyond their share (2003a: 49-61). He believes that

certainly, citizens who have democratic mutual regard for each other would, as an expression of their regard for other citizens as their equals, want to share these costs and not offload them onto others (ibid. 61).

Similarly, the interest right thesis is sensitive to the disadvantage to cooperators which is caused by the non-compliance of beneficiaries. On the basis of the same assumption, both White's reciprocity principle and the interest right thesis ultimately argue that beneficiaries have an obligation to do their share.

With regard to the fair right thesis, the interest right thesis can be stated in a negative mode as follows:

- When and if cooperators are disadvantaged by the non-compliance of beneficiaries, then the former should have a right to the compliance of the latter. [Normative premise]
- Cooperators are disadvantaged by the non-compliance of beneficiaries. [Factual premise]
- Therefore, cooperators have a right to the compliance of beneficiaries. [Conclusion]

The conclusion is not justified by the factual premise, which is not a justificatory reason, but only a condition, for the conclusion. The conclusion is justified by the normative premise, which is itself the very interest right thesis. The interest right thesis is justified when its normative premise is justified, on condition that the factual premise is satisfied.

Thus, if the interest theory of right is to reach the conclusion that cooperators have the right to the compliance of beneficiaries, the factual premise has to be satisfied, which is a premise to be established not by the interest theory of right but by the fair right thesis because the former just takes it for granted. And then, the interest theory of right should be able to explain how cooperators obtain the right to the compliance of beneficiaries when they are disadvantaged by the non-compliance of the latter while the latter do not gain a right to their non-compliance even though they are disadvantaged by their compliance. Once

the right of cooperators to the compliance of beneficiaries is established by the interest theory of right, the fair right thesis needs to clarify under which conditions the right of cooperators triggers the obligation for beneficiaries to comply with relevant rules. Let me begin with an argument that cooperators are not disadvantaged by the non-compliance of beneficiaries.

2.3. THE NO DISADVANTAGE ARGUMENT

An objection to the fair right thesis argues that cooperators are not disadvantaged at all by beneficiaries' benefiting from the goods in question because such benefit does not impose extra cost on cooperators. I call this objection the no disadvantage argument. Because cooperators are not disadvantaged by the act of benefiting by beneficiaries, the no disadvantage argument holds, beneficiaries are morally free to benefit and thus have no obligation to do their share in return for their benefit.

It is obvious that cooperators can benefit from the compliance of beneficiaries. If there are more cooperators in the same cooperative scheme, the whole cost of producing the goods in question will be divided by a greater number of cooperators, and then the average burden that every cooperator should bear will become smaller.

However, one does not have an obligation to improve the situation of others, although to do so is morally desirable. As Kagan clearly explains, 'an individual in need has no *claim* against me; I am not violating anyone's *rights* if I

fail to help him (in particular, I am not violating any positive right of the individual against me)’ (Kagan 1989: 218, original italic). Likewise, beneficiaries do not violate the right of cooperators to a smaller burden when they do not do their share. If it is because cooperators can benefit from the compliance of beneficiaries that the latter should be required to do their share, then even non-beneficiaries should be required to comply with relevant rules because their compliance would alleviate the burden on cooperators.

It should be noted, however, that the idea of the interest theory of right is that interest is not a reason for a right but a function that a right performs for the right holder. Therefore, it is when cooperators are disadvantaged by the act of benefiting of beneficiaries that the former have a negative right to the free-riding of beneficiaries. However, because cooperators are not disadvantaged by beneficiaries’ benefiting from the cooperative scheme, according to the no disadvantage argument, the former do not gain a right to the compliance of the latter.

The strength of the no disadvantage argument comes from the analysis of the goods in question. The goods in question are *cooperative goods* rather than public or club goods because they are not always supplied by a public organisation, because they are not excludable to non-members as club goods are, and because they are provided only by a cooperative act of people. Cooperative goods are non-excludable in their provision and mostly non-rival in their consumption like public goods²⁰. Non-excludability means that it is hardly possible or too costly to exclude people from enjoying the goods once they are

²⁰ For a full discussion about non-rivalness and non-excludability, see Snidal (1979).

supplied; it is not possible to stop people in a country being protected by national security. Sometimes it is not desirable to exclude people, for example, from drinking clean water from the tap. This is where the problem of cooperative goods introduces itself: free-riding. The problem of free-riding gets more complicated when we find the goods non-rival in their consumption; non-rival goods do not run out as more people use them. Once national defence is set up in a country, it is not exhausted as more people are born or immigrate into the country; thus, the problem of free-riding deepens. An important reason for this is that cooperative goods enjoyed by beneficiaries are an externality.

Externality is an economic term, on which there is no agreement with regard to its definition and significance²¹. It can be described, however, in the way that helps understand the goods in our question. Externality takes place when a provision of a good brings about extra benefit or extra cost; extra benefit that it does not take any extra cost to supply²² or extra cost that is necessary to remove or reduce side-effects of the original good. Positive externality is a good enjoyed by one but produced by others at no marginal cost; it does not necessitate any additional cost to have positive externality, the cost in addition to the original cost others spend for their original good. Meanwhile, a negative externality is a side-effect of one's own advantage that it costs others to correct.

²¹ For an economic understanding of externality, see Cornes & Sandler (1986) Chapter 3. For a political understanding of public goods, see Snidal (1979).

²² To supply extra benefit, it does not take extra cost of producing additional goods *or* extra cost of providing additional beneficiaries with original goods (Snidal 1979: 535). When it does not take extra cost to supply cooperative goods as externality, there is no cost of providing additional beneficiaries with original goods.

The most important point about externality in understanding cooperative goods is that cooperators do not have to pay any extra cost for the provision of the goods to additional beneficiaries²³.

The goods in question are understood as non-excludable and non-rival in their nature. National security is non-excludable since once it is set up, anybody in the same country is protected by it. It is also non-rival for it does not run out as more people live in the country. More relevantly to the principle of fairness, cooperative goods have positive externalities that do not cause any extra cost; it does not take any additional cost to provide new immigrants with national security. Therefore, the no disadvantage argument concludes that cooperators are not disadvantaged by the act of benefiting by beneficiaries and thus have no negative right to the free-riding of beneficiaries, i.e., a right that beneficiaries should not free-ride.

For instance, suppose there are a number of TV watchers who have paid their licence fee. The licence payers pay a fee for watching, as a result of which the TV service is made available for new immigrants as well as for themselves. Even though the new immigrants watch TV without paying their own licence fee, the fee for the existing payers does not become greater. The act of watching by the new immigrants does not exacerbate the burden on the existing payers. Therefore, the licence payers do not have a negative right to the new immigrants' watching, according to the no disadvantage argument.

²³ Hausman presents a brief collection of works on externality in his paper where he suggests the most relevant feature of externality with regard to questions of justice: 'an unintended effect of A on B to which A or B have not consented' (Hausman 1992).

Let me take another example for the no disadvantage argument. When a group of workers organise a labour union and win a wage increase, those who did not join the union in the same firm still get paid more than before, which does not require any extra effort from the union members. Suppose there are 100 workers who have joined the union and 10 workers who have not, in the same firm (110 workers altogether). Suppose also the union members make a cooperative effort of, say, 300 units to win a wage increase, 3 average units by each member. Then, there is no difference to the whole cost of the wage increase no matter whether the increase is for the 100 union members or for all the 110 workers. In other words, the 100 union members put an effort of 300 units, and this is enough for the wage increase for all the 110 workers. According to the no disadvantage argument, the 100 union members do not have a negative right to the non-compliance of the 10 non-union members because the latter's benefiting is not detrimental to the former. Therefore, the union members do not have the right to the compliance of beneficiaries and thus beneficiaries do not have to be required to join the union, sharing the burden for the wage increase.

2.4. THE FAIR RIGHT THESIS VS. THE NO DISADVANTAGE ARGUMENT

The fair right thesis may reply to the no disadvantage argument as follows. What the fair right thesis is concerned with is not the act of benefiting but *the non-compliance* of beneficiaries. Even though the non-union members' *benefiting*

from the effort of the union members does not exacerbate the burden on the members, their *non-compliance* does make the burden on the members heavier than it would be if the non-members joined the union and shared the whole burden. It is true that it does not cost cooperators for beneficiaries to benefit from a cooperative scheme as it does not incur an additional cost to provide beneficiaries with the goods, which are an externality of cooperation. The burden on cooperators will remain the same whether or not beneficiaries enjoy the goods. However, it is also true that beneficiaries disadvantage cooperators by *benefiting without doing their share* because their doing a share could reduce the burden on cooperators. The beneficiaries' act of benefiting does not make the burden of cooperators heavier, but that burden is heavier than it would be if beneficiaries did their share.

For example, the average cost of the wage increase paid by each member could have been reduced if the non-union members had joined the union, so the benefit for the non-union members could be regarded as the one provided at an extra cost of the union members. Each union member, if the 10 non-union members had joined, could have paid less than 3 units (about 2.7 units). This means that the union-members do about 0.3 units more than their fair share for the interest of the non-union members. So it can be argued that it took the 100 union members 30 units of extra effort to provide the non-union members with the wage increase, and thus that the non-cooperating members enjoy the benefit supplied at the sacrifice of the cooperating members, which otherwise would have been unnecessary. Therefore, the union members who have cooperated for the wage increase have the right to require the non-union members to do their

share.

The no disadvantage argument can make a counterargument. The cost that could have been unnecessary if the non-union members had joined is not actually the cost of the provision of the benefit enjoyed by the non-union members. The presumed 30 extra units of efforts that the union members have made in the absence of the non-union members, and that the non-union members could have reduced, are a part of the whole cost that is necessary for the wage increase for the very union members themselves. If the union members made only 270 units of effort, 2.7 units each, it would not be possible to win the pay rise at all, even for themselves. In order to win the increase for themselves, the members need to make 3 units of effort per each member. The union members do not put an extra effort of 30 units (extra 0.3 units each) *in order to* provide the non-union members with the wage increase. Therefore, it is not the case that the union members provide the non-members with the benefit at the cost of their sacrifice.

The fair right thesis can still maintain that even though the union members did not put in their effort for the non-union members, they are disadvantaged by the non-union members to the extent of the cost that would be unnecessary. The union members had to pay 0.3 units more than they would and should have had to if the non-members had joined the union and shared the cost. The 0.3 units is the burden the members would have not had to carry. The non-members cause a would-be-unnecessary, though not extra, burden on the shoulders of the members. If the non-union members would reduce the average effort by 0.3 units, the union members would be better off to the extent of 0.3

units on average. In other words, the members would benefit from having a right to the non-members, a right to require them to join the union, as a result of which the average cost would go down to 2.7 units from 3 units. For this reason, the existing members should be entitled to have the right to require the non-union members to join the union and lessen the burden on them by eliminating the would-be-unnecessary cost, according to the fair right thesis.

The no disadvantage argument may still argue that the would-be-unnecessary cost (0.3 units each) is actually trivial in the provision of cooperative goods. There are always free-riders when the goods in question are technically non-excludable and non-rival in their nature. However, the number of free-riders is not significant enough to reduce the average cost for all cooperators if they did their share. If there are a significant number of free-riders, the goods in question would be under produced or not produced at all; there are only a trivial number of free-riders. Thus, the would-be-unnecessary cost caused by free-riders must not be so considerable that cooperators are required to do significantly more than their share, or it is so trivial that the compliance of beneficiaries would not actually lessen the average burden shared by every cooperator.

The fair right thesis may appeal to the basic idea of the principle of fairness, which is concerned with not only free-riders but also beneficiaries including free-riders. It is not only free-riders but all beneficiaries who are required to do their fair share. If it is only free-riders who cause the would-be-unnecessary cost, then it must be so insignificant that their compliance would not make a great difference to the cost of the provision of the goods in question.

Even if all new immigrants to the UK paid their TV licence fee, the fee for all the watchers would not actually go down. However, the principle of fairness does not require only free-riders to do their share, but all beneficiaries whose non-compliance would make a significant negative difference to the provision of the good in question. Thus, beneficiaries, who are to become either cooperators or free-riders, should do their share so as not to force cooperators to do more than their own share.

Finally, the no disadvantage argument may point out that no one disadvantages others by not performing any action. That is, when beneficiaries do not do their share in return for benefit, they do not take any action that disadvantages cooperators; they just benefit from the scheme of cooperation, which does not make the burden on cooperators worse. Beneficiaries may lighten the burden on cooperators by sharing the burden, but they do not worsen the situation of cooperators by *not* sharing the burden. The non-payment of the TV licence fee by new immigrants does not exacerbate the fee for the existing payers. In short, no act, no disadvantage.

The fair right thesis can refer to Feinberg, according to whom ‘omissions’ can be an act of disadvantaging *when and if* other harmful conditions are met. He defines harmful conditions as follows:

A harms *B* if and only if :

- 1) *A* acts (in a sense wide enough to include omissions and extended sequences of activity)
- 2) in a manner which is defective or faulty in respect to the risks it creates to *B*, that is, either with the intention of producing the

consequences for *B* that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences; and

- 3) *A*'s acting in that manner is indefensible, that is, neither excusable nor justifiable; and
- 4) *A*'s action is the cause of an adverse effect on *B*'s self-interest (a "harmful condition"), which is also
- 5) a violation of *B*'s right; and
- 6) *B*'s personal interest is in a worse condition than it would have been had *A* not acted as he did [including omissions] (Feinberg 1990: 26).

'Omission', a failure to do something, can be an act of disadvantaging when the failure is performed in the ways that are explained by Feinberg. The non-compliance of beneficiaries can be an act of disadvantaging if it is performed in a way that is risky to cooperators, and beneficiaries' non-compliance is not justifiable and is the cause of disadvantageous effect on cooperators' interest, and cooperators' interest is 'in a worse condition than it would have been' had beneficiaries not disobeyed relevant rules. In these senses, beneficiaries can disadvantage cooperators by not doing anything, that is, by not doing their share.

2.5. THE INTEREST THEORY OF RIGHT, DUTY-DEPENDENT

The debate between the fair right thesis and the no disadvantage argument reaches the conclusion that there is a sense in which cooperators are disadvantaged by the non-compliance of beneficiaries. This is, however, only the

factual premise of the interest theory of right. In order for the factual premise to proceed to the conclusion of the interest theory of right, it needs to be established that when cooperators are disadvantaged by the non-compliance of beneficiaries, the former acquire a right to the compliance of the latter.

Once it has been established that cooperators are disadvantaged by the non-compliance of beneficiaries, we normally think that cooperators should have the right to the compliance of beneficiaries when and if they are disadvantaged by the non-compliance of the latter. However, it does not automatically follow that cooperators gain the right to the compliance of beneficiaries. If it is because cooperators are disadvantaged by the non-compliance of beneficiaries that the former can have the right to the compliance of the latter, then they should have the right to the compliance of those who have nothing to do with the goods in question. For example, if citizens of a country B can contribute to the national security of a country A, then citizens of the country A will be disadvantaged by citizens of the country B to the extent that they could benefit from them. This fact, however, does not imply that citizens of the country A can have a right to the contribution of citizens of the country B to their national security. Thus, the disadvantage incurred to cooperators by the non-compliance of beneficiaries is not sufficient to justify the right of the former to the compliance of the latter.

In addition, if it is because cooperators are disadvantaged by the non-compliance of beneficiaries that the former can have the right to the compliance of the latter, then beneficiaries should have a right to their own non-compliance because they can benefit from their non-compliance or can be disadvantaged by their own compliance. It is obvious that beneficiaries will be worse off if they

comply with relevant rules and bear burdens in return for their benefit, in comparison to when they benefit from a cooperative scheme without doing their share. If we follow the line of argument from the interest theory of right that is premised on the fact that cooperators are disadvantaged by the non-compliance of beneficiaries, we will have both the right of cooperators to the compliance of beneficiaries and the right of beneficiaries to their non-compliance, which are incompatible with each other.

Therefore, on top of the disadvantage placed onto cooperators by the non-compliance of beneficiaries, we need another condition for the right of cooperators to the compliance of beneficiaries. The disadvantage that cooperators may experience is caused by the non-compliance of beneficiaries while the disadvantage that beneficiaries may face is created by their compliance. Cooperators should not be disadvantaged by the non-compliance of beneficiaries because the disadvantage is caused by the non-compliance of beneficiaries, which is a morally unacceptable act. The disadvantage that cooperators may experience is something that should be avoided even at the cost of beneficiaries. In contrast, beneficiaries should face the disadvantage caused by their compliance, which is a morally right act. The disadvantage that beneficiaries may face is something that cannot be avoided at the sacrifice of cooperators. While beneficiaries have at best an option right to their non-compliance, which is not morally demanding enough to require cooperators to undergo illegitimate disadvantage, cooperators have a right which is morally demanding enough to require beneficiaries to endure legitimate disadvantage.

The interest theory of right is dependent upon the distinction between

illegitimate and legitimate disadvantage. That is, cooperators should be protected from illegitimate disadvantage while beneficiaries should tolerate legitimate disadvantage; beneficiaries should be required to do their fair share so as not to disadvantage cooperators in an illegitimate way even though they have to face a legitimate disadvantage.

Therefore, in order for the right of cooperators to obtain without allowing beneficiaries to have the right to their non-compliance, it is necessary to presuppose that it is morally wrong and thus disallowed for beneficiaries not to comply with the rules of a cooperative scheme that produces the goods in question for beneficiaries by virtue of the compliance of cooperators.

2.6. THE FAIR RIGHT THESIS, DUTY-DEPENDENT

The interest theory of right can draw the conclusion that cooperators have the right to the compliance of beneficiaries when and if they are disadvantaged by the non-compliance of the latter, which needs to presuppose that it is morally wrong for beneficiaries not to comply with relevant rules. The conclusion of the interest theory of right is only a premise of the fair right thesis that holds that when cooperators have the right to the compliance of beneficiaries, the latter come to have an obligation to comply with relevant rules. On the basis of the premise that cooperators have the right to the compliance of beneficiaries, can the fair right thesis proceed to its conclusion that beneficiaries have an obligation to obey the rules of a cooperative scheme of cooperators?

It apparently sounds right to say that beneficiaries should be required to comply with relevant rules in order to protect the right of cooperators not to be disadvantaged by the non-compliance of beneficiaries. This argument, however, is dependent on the idea that the right of cooperators is a claim-right that correlates with a corresponding obligation. Thus, the fair right thesis needs to propose conditions under which cooperators have a claim-right to the compliance of beneficiaries.

Kagan's analysis of rights can help the fair right thesis here. He analyses thin and full rights by studying three elements of rights:

- *an option* for the agent to do X (or not to do X, as he chooses),
- *an injunction* protecting the agent's decision – i.e., it is wrong for others to force the agent not to do X, and
- *an enforcement privilege*, giving the agent the right to enforce the injunction' (Kagan 1989: 219, 221, italics added).

According to Kagan, others have an obligation to 'refrain from doing something or to do something' only if the agent has a *thin* right that contains only *an injunction* (ibid. 221, 227-8), rather than a full right that includes all three elements. 'An option' right is only a freedom and thus is not strong enough to enforce others (not) to do something. For example, I have 'an option' right to watch TV at any time, which, however, does not mean that I have a right to require others to buy me a TV or to pay the TV licence fee for me. 'An enforcement privilege' right is too strong to require others (not) to do something

as it is not compatible with ‘an enforcement privilege’ of others. Kagan explains that ‘there is an obvious conflict between my having a negative right and your having a positive right to the same thing’ (ibid. 227). For example, suppose that one of my neighbours wants to listen to loud music in the morning while I want to have a quiet time at the same time. Even though my right to a quiet time in the morning includes an enforcement privilege, I cannot require my neighbour to turn off her loud music for me if she also has a right to the music that includes an enforcement privilege; she can require me to tolerate her loud music. Therefore, it is only when a right contains ‘an injunction’ that the right holder can require others (not) to do something. That is, if an agent has a thin negative right (an injunction) to something, then others are required not to do it to her; if an agent has a thin positive right (an injunction) to something, then others are required not to prevent the agent from getting it.

To put in our language, if cooperators have a thin negative right to the non-compliance of beneficiaries, then beneficiaries have an obligation not to free-ride; if cooperators have a thin positive right to the compliance of beneficiaries, then beneficiaries have an obligation to comply with relevant rules. This means that the right of cooperators to the compliance of beneficiaries is not demanding enough to impose the fairness obligation on beneficiaries if the right of cooperators includes only an option right or if beneficiaries have an injunction right to their non-compliance.

Thus, in order for the right of cooperators to be able to bind beneficiaries to the fairness obligation, (1) the right of cooperators should involve ‘an injunction’, and at the same time (2) beneficiaries should not have an injunction

right to their non-compliance let alone an enforcement privilege even though they may have an option right to that.

First, cooperators should have an injunction right to the compliance of beneficiaries, not merely an option right. For example, one of two applicants for a scholarship may disadvantage the other applicant by winning the scholarship for herself to the extent that the other applicant could benefit from winning the scholarship. In this case, the right of an applicant not to be disadvantaged cannot be employed as a reason for which he forces the other applicant to give up her application. This is because either applicant has only an option right to the scholarship. Likewise, cooperators who have only an option right cannot impose the fairness obligation on beneficiaries. They require an injunction right to the compliance of beneficiaries.

At the same time, second, beneficiaries should not have an injunction right to their non-compliance. The injunction right of cooperators to the compliance of beneficiaries may conflict with the injunction right of beneficiaries to their non-compliance. For example, a lung patient needs to breathe fresh air for her life while a blacksmith in the same village needs to put coal in the fire for his living. Both a lung patient and a blacksmith equally have an injunction right to incompatible requirements. A blacksmith is required not to pollute the air for the interest of a lung patient while a lung patient is required to tolerate coal tar for the interest of a blacksmith. Similarly, cooperators and beneficiaries may have an injunction right to incompatible requirements for their interests; the compliance and the non-compliance of the latter. Thus, beneficiaries should not have an injunction right to their non-compliance in order

for the injunction right of cooperators to be able to bind beneficiaries to the fairness obligation.

To sum the discussions so far, cooperators are disadvantaged by the non-compliance of beneficiaries; cooperators can have the right to the non-compliance of beneficiaries; in order that the right of cooperators binds beneficiaries to the fairness obligation, it should involve an injunction while the right of beneficiaries should not include an injunction at the same time. Thus, we need a condition that provides the right of cooperators with an injunction and also prevents the right of beneficiaries from including an injunction.

We can say that it is morally right for cooperators to have the right to the compliance of beneficiaries not because they are disadvantaged by the non-compliance of the latter but because their disadvantage is illegitimately caused by the non-compliance. For example, a scholarship applicant may have won the scholarship by lobbying or cheating the scholarship committee, which results in the failure of the other applicant. In this case, the unsuccessful applicant has a right to the disqualification of the wrong winner and to the scholarship. The right of the unsuccessful applicant not to lose the scholarship in an unfair way has to be protected by disqualifying the wrong successful applicant for the scholarship. The right not to be disadvantaged by the non-compliance of beneficiaries which is morally wrong in itself must be legitimate in binding beneficiaries to relevant rules.

In contrast, because the compliance of beneficiaries causes the legitimate disadvantage to themselves, they are not entitled to have an injunction right to their non-compliance. If the scholarship has been awarded to the fair and right

applicant, which brings some disadvantage on the unsuccessful applicant to the extent that she could win the scholarship, the latter has no right to require the former to concede the scholarship to her. It is morally right to say that beneficiaries should not have the right to their non-compliance even though their compliance would disadvantage themselves, because the disadvantage to beneficiaries is legitimate.

The discussion so far suggests that it is necessary that beneficiaries have a duty to follow relevant rules no matter whether cooperators have an interest in the compliance of beneficiaries and even though beneficiaries have an interest in their non-compliance. The fact that beneficiaries are duty-bound to their compliance secures the injunction right of cooperators to the compliance of beneficiaries and also invalidates the injunction right of beneficiaries to their non-compliance. The right of cooperators is dependent upon the duty for beneficiaries to do their share for its successful function to impose the fairness obligation on beneficiaries.

2.7. CONCLUSION

To draw a conclusion of the fair right thesis: we must posit that beneficiaries of a cooperative scheme for which cooperators sacrifice themselves have the fairness obligation to do their share first because they have a duty to do so and because by doing so can the right of cooperators be protected. This means that the fair right thesis can suggest a moral foundation for the principle of fairness *on*

condition that there is a natural duty for beneficiaries to do their share in return for their benefit received from a cooperative scheme for which cooperators comply with the rules of the scheme.

In this light, a duty for beneficiaries to do their own share has priority over the right of cooperators. If beneficiaries do not have a duty to do their share, i.e., if they can have an injunction right to their non-compliance, the right of cooperators cannot by itself impose the fairness obligation on beneficiaries. Therefore, beneficiaries must have a natural duty to do their fair share irrespective of whether cooperators have the right to the compliance of beneficiaries. In other words, the natural duty for beneficiaries to do their fair share is independent of the right of cooperators.

The natural duty to do one's share in return for one's benefit is necessary for the fair right thesis of the principle of fairness. However, the duty must be explored in detail with respect to its plausibility as a moral foundation of the principle of fairness. Before going on to explore that duty, we need to visit another understanding of 'mutuality of restrictions', the fair equality thesis.

3. MORAL FOUNDATIONS OF THE PRINCIPLE OF FAIRNESS II: EQUALITY BETWEEN COOPERATORS AND BENEFICIARIES

“We should do A because they will do B”
may justify our doing A,
but it does not justify it *comprehensively*
if they are not justified in doing B.
(Cohen 1992: 279, italic added)

3.0. INTRODUCTION

A basic idea of the principle of fairness, ‘mutuality of restrictions’, was interpreted as the fair right thesis. That thesis has been examined in the last chapter as a moral justification of the fairness obligation with the presupposition that there is a natural duty for beneficiaries to do their share in return for their benefit. This chapter pursues the fair equality thesis as the other interpretation of ‘mutuality of restrictions’, which basically holds that both cooperators and their beneficiaries should equally comply with the rules of a cooperative scheme that produces the goods available for both of them. Equality between cooperators and beneficiaries is supposed to justify the fairness obligation for beneficiaries to do their share in return for the benefit from a cooperative scheme in which cooperators comply with the rules.

To examine the ideal of equality as a moral foundation of the principle

of fairness requires making clearer a question about equality, equality of what? (Sen 1980, Dworkin 1981a and 1981b, Clayton & Williams 2002: 1). This chapter suggests (in Section 3.1) equal compliance as the currency of equality that the fair equality thesis should employ for the discussion about the moral foundation of the principle of fairness. Equal compliance is compared with other egalitarian currencies such as equal treatment, equal amount of compliance, equal outcome of compliance, and equal opportunity for compliance.

Having figured out the currency of equality for the discussion about the fair equality thesis, the chapter presents the thesis in the form of syllogism in Section 3.2, which also explains and proves the factual premise that there are cooperators who do their share in the principle of fairness. The normative premise of the fair equality thesis is verified in Section 3.3 on the basis of equal compliance. During the process of establishing the normative premise, comparative egalitarianism is shown to be more promising than universal egalitarianism in supporting the fair equality thesis that is sensitive to inequality. It is noted, nonetheless, that comparative egalitarianism must be dependent upon a moral fact that there is a natural duty to do one's share in return for one's benefit, in order to be insensitive to inequality of a morally wrong kind. Section 3.4 concludes discussions of the fair equality thesis, which does not endorse that the fair equality thesis is an empty or an independent idea of equality, but only that the thesis is dependent upon the independent duty to do one's share. Section 3.5 provides a summary of the chapter.

3.1. EQUALITY OF WHAT?

According to the fair equality thesis, both cooperators and beneficiaries should be equally required to do their fair share in return for their benefit. ‘Equal distribution of restrictions and so of freedom’ of both cooperators and beneficiaries is the reason for which the latter should be required to contribute in return for their benefit, according to Hart (1955: 191). As his suggestion of ‘mutuality of restrictions’ shows, the concern for equal restriction is the core idea of the principle of fairness. On the basis of ‘the equal right of all men to be free’ (ibid. 175), Hart constructs the principle of fairness that requires the freedom of both cooperators and beneficiaries to be equally restricted. It is against the ideal of equality that beneficiaries enjoy cooperative goods without any restriction while cooperators restrict their freedom in order to produce the goods.

In the same line of argument, comparative concern plays a key role in Klosko’s understanding of the principle of fairness (Klosko 1992: 34). As the moral basis of the principle of fairness, he cites Lyons’ reference to ‘the just distribution of benefits and burdens’ and Rawls’ declaration that ‘we are not to gain from the cooperative labors of others without doing our fair share’ (Klosko 1992: 34). These quotations do not necessarily entail the ideal of equality as the source of the fairness obligation²⁴, but are interpreted so by Klosko. When he says that ‘it is wrong for certain people to be exempt from burdens others must

²⁴ ‘Just distribution’ by Lyons can be interpreted as fair, legitimate, or reasonable as well as equal distribution while ‘no gain without fair share’ by Rawls could mean reciprocity rather than equality.

bear in the absence of morally relevant differences between them' (ibid. 34), he appeals to so called relational fairness. Hart and Klosko explicate the principle of fairness with the ideal of equality.

3.1.1. Equality?

Can 'mutuality of restrictions' (Hart) and relational fairness (Klosko) be rightly interpreted as the value of equality? If possible, then what kind of equality is it? Raz's distinction between *equality* and *universal entitlement* will help us here. Saying that 'universality may be a necessary condition for a principle to count as an egalitarian one, but it is not a sufficient qualification for egalitarian status', he distinguishes between 'strict egalitarianism' and 'rhetorical egalitarianism' (Raz 1986: 221-233). According to Raz, 'strict egalitarianism' is 1) sensitive to inequality between the parties in question and 2) purposely designed to decrease inequality between them. By contrast, 'rhetorical egalitarianism' is focused on 'the well-being of all human beings' and just accidentally works for equality. His prototype of 'strict egalitarianism' is 'All Fs who do not have G have a right to G if some Fs have G' (ibid. 225), in which 'equality is not only its result but also its purpose' (ibid. 225). On the other hand, 'rhetorical egalitarianism' takes a simpler form like this; 'All Fs are equally entitled to G' (ibid. 220), which produces 'equality (in some respect) as an incidental by-product' (ibid. 228) because it is 'not designed to achieve equality but some other good' (Ibid. 229).

'Mutuality of restrictions' meets one of two conditions for 'strict egalitarianism', sensitivity to inequality. Hart holds that only by restricting the freedom of beneficiaries *when* that of cooperators has been restricted can 'equal

right of all men to be free' be achieved. Although 'mutuality of restrictions' is sensitive to inequality, its ultimate purpose is not the reduction of inequality between cooperators and beneficiaries, but 'equal right of all men to be free' (Hart 1955: 175, 191), which ultimately seeks to respect the universal entitlement of all human beings. That is, Hart suggests that unequal restrictions between cooperators and beneficiaries be removed in order to achieve universal equality. In this sense, 'mutuality of restrictions' is not a full version of 'strict egalitarianism'. Although it is not strict egalitarianism, 'mutuality of restrictions' is manifestly sensitive to inequality; the non-compliance of beneficiaries is contrasted to the compliance of cooperators.

The purpose of the principle of fairness by Klosko is 'to show that the noncooperators also have obligations to cooperate' (Klosko 1992: 34). In order to achieve this purpose, Klosko appeals to *relational fairness* that refers notably to inequality between cooperators and beneficiaries. To repeat his own phrases, 'it is wrong for certain people to be exempt from burdens others must bear in the absence of morally relevant differences between them' (Klosko 1992: 34). Here judged morally wrong is inequality between one party who bears a burden and the other party who is exempt from it. As Klosko takes Hart's 'mutuality of restriction' as 'the moral basis of the principle of fairness' (ibid. 34), he understands that inequality between cooperators and beneficiaries is to be removed in order to achieve relational fairness. Even though the ultimate purpose is not equality but obligation, *relational fairness* is evidently sensitive to inequality between cooperators and beneficiaries.

Now that equality between cooperators and beneficiaries is suggested by

Hart and Klosko as the reason why beneficiaries should be required to do their share, what sort of equality between them do they mean, exactly? Does it mean that both beneficiaries and cooperators should be equally treated (equality of treatment)? Should equality aim at the restriction of freedom to the same extent, i.e., *equal extent of requirement*? Is the principle of fairness designed for *equal outcome of requirement*? Should cooperators and beneficiaries be given an equal chance not to be free from the requirement rendered by the principle of fairness, that is, *equal opportunity for requirement*? The following section suggests equal compliance as the right currency of equality that the fair equality thesis should employ in discussing the moral foundation of the principle of fairness. Equal compliance will be also compared with other egalitarian currencies and proved to be the right currency for the question of the moral foundation of the principle of fairness.

3.1.2. Equality of compliance

The principle of fairness is a theory of obligation, which provides individual beneficiaries with a moral foundation for their compliance. Hence, if equality can serve as such a moral foundation, it needs to be adjusted into an interpersonal, rather than institutional, currency which can be fleshed out as *equal compliance*.

According to equal compliance, if cooperators comply with the fairness obligation, beneficiaries should equally comply with it, other things being similar. Equal compliance is an interpersonal currency of equality on which beneficiaries should act as individuals. It is equal compliance that is to be adopted by the fair

equality thesis as a moral foundation of the principle of fairness as a theory of obligation.

Equal compliance can be understood more clearly when compared with other currencies of equality. First, equal compliance should not be confused with equality of treatment, an institutional currency of equality for the sake of which a cooperative scheme should treat all beneficiaries with equal concern. Cullity tries to find the fundamental reason for the principle of fairness in the idea of impartiality, which can be employed as a virtue for equality of treatment. He writes:

The core of a good general account of the fairness and unfairness of action, I claim, is this. Unfair actions are *failures of appropriate impartiality*; fair actions are those that are not unfair. Ways of treating the members of a given group impartially are ways of preserving neutrality between them... Failures to contribute towards producing compulsory goods can have *this* feature. So such failures can be unfair (Cullity 2008: 3, 13, his italics).

That is, the non-compliance of beneficiaries with the rules of a cooperative scheme with which cooperators have complied is unfair because it is a failure to be impartial between the parties.

However, I see confusion between the agents of compliance and treatment. It is beneficiaries who should comply with the rules just as cooperators have done, while it is a cooperative scheme that should treat cooperators and beneficiaries impartially and require both parties to comply with the rules. Beneficiaries may have a natural duty to obey the scheme that is

impartial to both cooperators and beneficiaries. However, they do not themselves have an obligation to be impartial and fair by complying with the scheme; it is the scheme that is required to be fair by being impartial to its members. It is for a cooperative scheme to treat equally cooperators and beneficiaries with reference to impartiality. It is for beneficiaries to comply with the requirement of the scheme in accordance with equal compliance.

For example, there are 15 cleaners in a school, all of whom work for three hours every mid-week evening. They are to start their work at 3 pm and finish at 6 pm according to the contract. Suppose a cleaner called Anne leaves a quarter of an hour early in her own interest. Having noticed Anne finishing her shift quarter of an hour early, Vicky finishes exactly quarter of an hour early on the following day, in order to treat herself equally to Anne. Vicky thinks that it is not fair for Anne to finish earlier while everyone else wants to finish earlier but keeps to the right time. It is not fair to say that referring to equal treatment, because all cleaners including Anne and Vicky have been *equally required* to finish at 6pm, Vicky is required to finish at 6pm *and* should comply with the contract hours, no matter whether Anne actually finishes at 6pm or not. Rather, it is fair to say that Vicky should finish at 6pm *not only because* she was equally treated in being required to do so, *but also because* others finish at 6pm. This follows the basic idea of the fair equality thesis. It is when and because Anne and all other cleaners comply with the contract and finish at 6 pm that Vicky should also comply and finish at 6 pm, according to the fair equality thesis.

Second, we are prone to expect *equal extent of compliance* from beneficiaries, but we should be careful not to. Hart did not want every TV

watcher to pay the same amount of licence fee, but to pay as existing payers do. When he suggests ‘mutuality of restrictions’ as the foundation of the fairness obligation, Hart is not concerned with the restriction of freedom *to the equal extent* but *equal restriction* of freedom between cooperators and beneficiaries. The freedom of beneficiaries should not be restricted as much as that of the other party, cooperators.

Third, equal compliance should be distinguished from *equal outcome of compliance*, too. In order to distinguish from a version of egalitarianism his reciprocity principle that has the same fundamental feature as the principle of fairness, White denies that the reciprocity principle is reducible to the ideal of equality of welfare (White 2003: 67-74). He does agree that ‘restriction of parasitism’ has a positive effect on equality between cooperators and beneficiaries, but does not agree that equality is necessarily brought about by the restriction. White suggests a case where *inequality* of welfare is produced as a result of imposing the reciprocal requirement on beneficiaries. However, I do not try to examine if equal compliance would bring about equal or unequal outcome of compliance. What I would like to mention is that it is not equal outcome of compliance but equal compliance itself that the fair equality thesis should suggest as an egalitarian foundation of the principle of fairness.

Forth, equal compliance will be made even clearer when compared with *equal opportunity for compliance*. Equal opportunity can be employed for the argument both for and against the fairness obligation: equal opportunity for compliance and for non-compliance. Everyone is equal in having a chance not to comply while everyone is also equal in having a chance to comply. Equal

opportunity *not* to comply cannot be naturally the foundation for requirement. As such, we do not need to examine it as the foundation of the fairness obligation.

Equal opportunity may offer a positive reason for the fairness obligation: beneficiaries should be bound to the rules of a cooperative scheme just as cooperators have been; that is, equal opportunity for requirement. On the basis of *equal opportunity for compliance*, beneficiaries should not free-ride for cooperators have not done so. One may argue that cooperators did not have a chance to choose between cooperating and free-riding, but were merely required to cooperate, so beneficiaries should not be given an opportunity to free-ride either, for the sake of equal opportunity. Equal opportunity for requirement in this respect seems very similar to the equality that Hart and Klosko had in mind when they suggested ‘mutuality of restriction’ and relational fairness; both cooperators and beneficiaries are to be equally required to do their fair share.

There is, however, a difference between equality, as conceived by Hart and Klosko, and equal opportunity for compliance. For Hart and Klosko, both cooperators and beneficiaries are to equally comply with the fairness obligation, which requires neither the same extent or outcome of compliance, nor the same opportunity for compliance, but the same kind of requirement that both cooperators and beneficiaries have to make a contribution to the production of the goods in question. When they appeal to equality between cooperators and beneficiaries in requiring the compliance of beneficiaries, they believe that beneficiaries should comply, not necessarily as much as cooperators were required (equal extent of requirement). They do not argue for equality because cooperators had no choice but to comply (equal opportunity for compliance), but

they argue for equality as cooperators have complied (equal compliance). It is not the extent or outcome of requirement, not an opportunity to free-ride, but the compliance itself that should be made equally by both cooperators and beneficiaries. According to the fair equality thesis, for example, when I comply with the TV licensing law, I do not pay the same amount of fee, nor am I given the same chance not to free-ride, but I am to pay for my licence as other payers have paid for their own licences.

In sum, the right currency of equality as a moral foundation for the principle of fairness is *equal compliance* because the principle does not require a cooperative scheme but the agents, both cooperators and beneficiaries to comply with the fairness obligation. It is not equality of treatment because it is for a cooperative scheme to treat cooperators and beneficiaries equally. Also, it is not the equal extent or outcome of compliance, or equal opportunity for compliance because they are not necessarily expected from beneficiaries. Thus, equal compliance is the form of equality to which the fair equality thesis is to make its appeal.

3.2. THE FAIR EQUALITY THESIS: ITS FACTUAL PREMISE

The fair equality thesis that appeals to equal compliance runs as follows²⁵:

- Beneficiaries should do their share if there are cooperators who do theirs,

²⁵ I borrow the way to state and discuss the thesis from Cohen (1992).

other things being similar. [Normative premise]

- There are cooperators who do their share. [Factual premise]
- Thus, beneficiaries should do their share, other things being similar.

First of all, the fair equality thesis needs to satisfy the factual premise that there are cooperators who do their share. In exploring this, it will be demonstrated that equal compliance is sensitive to prospective inequality.

Inequality-sensitive equal compliance should satisfy the factual premise of the fair equality thesis. The normative premise of the thesis reaches the conclusion on condition that there are cooperators who do their share. Even though the fact that there are cooperators who do their share does not justify the fairness obligation to be imposed on beneficiaries, it is necessary for the fact to be the case in order for the fair equality thesis to reach its conclusion. If there are no cooperators, then the fair equality thesis cannot be justified on the basis of comparative egalitarianism which is sensitive to inequality between the compliance of cooperators and the non-compliance of beneficiaries. In order to balance the compliance of cooperators and the non-compliance of beneficiaries, there have to be cooperators who do their share. Thus, it needs to be validated that there are cooperators who do their share.

As mentioned earlier, it is impossible that there are no cooperators because there will be no goods at all without cooperators. The fact that there are beneficiaries who are to do their share in return for their benefit means that there are cooperators who have done their share, through which the goods are made available to beneficiaries. Thus, there is no doubt that there are cooperators who

have done their share when there are beneficiaries yet to come under the fairness obligation.

One may point out two cases where the counter party may be missing in establishing equality. There may be no preceding cooperators who have done their share but only the first ever cooperators. The first ever cooperators should comply with the rules of cooperation just as who has complied with them? For example, twenty people need a well in their small village and try to dig one. Every one of them is able to join the work and is required to do so. They are only the first cooperators who are required to cooperate. Equality between them and whom is the reason for them to comply with the requirement?

In addition, to take another example, when some people drop litter in the public streets, they benefit from the cooperation of others who will have raised would-be-unnecessary public funds for dustmen. There is no inequality between litter droppers and non-droppers until the latter pay for dustmen. In cases like these where a negative externality is produced, there are no cooperators who have done their share, so there is no actual inequality.

It is not hard to overcome the problem of the missing counterpart, the first cooperators, in achieving equal compliance. The first cooperators should comply as equally as their *fellow* cooperators do²⁶. Just as their fellow cooperators submit themselves to digging a well, the first cooperators have to submit, too. This is of course not sensitive to actual inequality between the parties in question because it is yet before fellow cooperators have done their share that the first cooperators are required to do their share. There is no

²⁶ I owe this idea to Andrew Reeve.

imbalance between the non-compliance of the first cooperators and the compliance of fellow cooperators until the latter have done their share. Therefore, what comparative egalitarianism can be sensitive to is *prospective inequality* that may be caused by the non-compliance of the first cooperators if fellow cooperators have done their share. It is indubitable that there are fellow cooperators; otherwise there will be no goods for the first cooperators. As a matter of fact, there is no significant temporal gap between the act of benefiting by the first cooperators and the act of cooperating by fellow cooperators because it is only when there are fellow cooperators who do their share that the first cooperators can benefit from their cooperation. Thus, it is obvious that the first cooperators will cause an inequality by their non-compliance when there must be some fellow cooperators.

Inequality between future cooperators and beneficiaries of negative externality may be caused by the latter's non-compliance. There is no actual inequality between beneficiaries and future cooperators until the latter have done their share. However, comparative egalitarianism is sensitive to *prospective inequality* that may arise between the non-compliance of beneficiaries and the compliance of future cooperators who will have done their share.

There may be no future cooperators, in which case the counterpart of inequality is missing. If the future generations do not comply, beneficiaries of negative externality cannot cause inequality by their non-compliance. There cannot be *beneficiaries* without future cooperators. If a small number of people drop a trivial amount of litter in public streets, other people do not need to raise public funds for dustmen. The small number of litter droppers do not benefit

from the cooperation of others. If there are no prospective cooperators for the removal of the negative externality, there will be no beneficiaries of the compliance of prospective cooperators. Neither comparative egalitarianism nor the principle of fairness is of use when there are neither cooperators nor beneficiaries. Therefore, the cases where there are no beneficiaries or future cooperators have nothing to do with the principle of fairness.

In sum, it is obvious that there are cooperators who do their share; they may be cooperators who have done their share, the first fellow cooperators who are doing their share, or the future cooperators who will have done their share. Equal compliance between these cooperators and beneficiaries needs to be accomplished by the compliance of the latter.

3.3. THE FAIR EQUALITY THESIS: ITS NORMATIVE PREMISE

It is obvious that there are cooperators. Equality between them and beneficiaries should be achieved by the compliance of the latter. The fair equality thesis meets the condition that there are cooperators who do their share. However, the satisfaction of this condition is not a justification of the compliance of beneficiaries. According to Cohen,

“we should do A because they will do B” may justify our doing A, but it does not justify it comprehensively if they are not justified in doing B, and we do not provide a comprehensive justification of our doing A if we

set aside as irrelevant the question whether they are justified in doing B (Cohen, 1992: 279).

As Cohen holds that our doing A is not *comprehensively* justified until their doing B is justified, the fair equality thesis is justified not only by justifying its normative premise, but also by *justifying* its factual premise. That is, beneficiaries' doing their share can be comprehensively justified by the justification of cooperators doing their share.

Why should beneficiaries and cooperators do their share? They should do their share as their (fellow or future) cooperators do theirs, according to equal compliance. Precisely speaking, according to the fair equality thesis, it is *not because* there are (fellow or future) cooperators who do their share that beneficiaries and cooperators should do their share. It is because they should avoid inequality that may take place between their non-compliance and the compliance of (fellow or future) cooperators. Likewise, both beneficiaries and cooperators should do their share to avoid inequality between them and their (fellow or future) cooperators.

Therefore, the justification of both the factual premise and the normative premise is sensitive to inequality between the parties in question. In the factual premise, cooperators should do their share in order to avoid inequality between them and their fellow cooperators. In the normative premise, beneficiaries are required to do their share so as not to cause inequality between them and cooperators. Both the factual and the normative premises can be justified on the basis of equal compliance between the parties in question.

The fair equality thesis that appeals to equal compliance may be based

on two egalitarian theses for its justification; one is universal egalitarianism, the other is comparative egalitarianism. Comparative egalitarianism is ‘strict egalitarianism’ and universal egalitarianism is ‘rhetorical egalitarianism’ in Raz’s terms (1986: 221-223). I use the expressions ‘universal’ and ‘comparative’ rather than ‘rhetorical’ and ‘strict’ because they help to understand the fair equality thesis in a way that is more readily analysed, as is explained later. However, I still follow Raz’s explanation of ‘rhetorical egalitarianism’ and ‘strict egalitarianism’. Comparative egalitarianism is sensitive to inequality and purposely designed to promote equality while universal egalitarianism is focused on ‘the well-being of all human beings’ and just accidentally works for equality. In this section, I find comparative egalitarianism with a presupposition more promising than universal egalitarianism in justifying both the factual and the normative premises of the fair equality thesis.

As Hart’s ‘mutuality of restrictions’ aims to sustain the ‘equal right of all men to be free’, the fair equality thesis may appeal to universal egalitarianism which states that all beneficiaries should equally do their share, other things being similar. Or, as ‘mutuality of restrictions’ is sensitive to inequality between compliance and non-compliance, the fair equality thesis may be based on comparative egalitarianism according to which beneficiaries should comply with the fairness obligation if cooperators comply with it, other things being similar. Let me examine these one by one.

3.3.1. Universal egalitarianism

Universal egalitarianism has two hurdles to get over for its justification of the fairness obligation, only the first of which can be overcome. First, both the

compliance and the non-compliance of all beneficiaries would equally result in equality, though at different levels. Just as all beneficiaries may achieve by their compliance ‘equal distribution of restrictions and freedom’, so they reach the same destination through universal non-compliance. Even though the level of equality is different, equality between all beneficiaries is accomplished by both everyone’s compliance and everyone’s non-compliance. The level of equality has nothing to do with equal compliance, which may, or may not, bring about equal outcome of compliance, depending upon the contents of the compliance and the capacity of the agents. Equal compliance is compatible with equality of non-compliance with respect to the ideal of equality. Even if beneficiaries do not do their share, the ideal of equality will be still achieved if all beneficiaries do not do their share. Thus, universal egalitarianism does not seem to be in a definite position to require beneficiaries to do their share.

However, it is not possible for there to be only non-complying beneficiaries. It cannot be the case that there are only free-riding beneficiaries without cooperators because there will be no goods in question in the absence of cooperators. So, the non-compliance of *all* beneficiaries, i.e., the absence of cooperators, is not a case for the principle of fairness. Cooperators might have died and there are now only beneficiaries who do not do their share. In a synchronic sense, there are no cooperators, only beneficiaries. However, in a diachronic sense, it is not the case that *all* beneficiaries through generations do not do their share. The non-compliance of all beneficiaries is only a theoretical test, not a practical challenge for universal egalitarianism.

Second, universal egalitarianism can hardly survive the problem of

unfairness. When universal egalitarianism normatively requires that all beneficiaries should do their share, other thing being equal, free-riders are in the way. Some beneficiaries who are aware of free-riders will find it unfair for them to comply with the fairness obligation because free-riders do not comply with it. Even though some beneficiaries agree that all beneficiaries including themselves should do their share, they will think it unfair for them to do so if they know that there are free-riders. Vicky, the cleaner in one of the earlier examples, would agree that all cleaners should finish at 6 pm according to the contract. However, when she finds some cleaners finishing their shift earlier in their own interests, she feels it unfair for her to finish even at the contracted hour. Universal egalitarianism loses its normative power in the presence of free-riders.

3.3.2. Comparative egalitarianism

The presence of free-riders troubles comparative egalitarianism, too. Comparative egalitarianism, being sensitive to inequality, finds it hard to appeal to equality in cases in which not all beneficiaries do their share. If comparative egalitarianism argues that beneficiaries should do their share when cooperators do theirs, other things being similar, for the sake of comparative equality, then it is also the case that beneficiaries do not have to do their share when some beneficiaries (free-riders) do not do theirs. Equality between cooperators and beneficiaries may be achieved by the compliance of the latter, which, however, also creates inequality between beneficiaries and free-riders. There will be a problem of inequality between beneficiaries and free-riders.

For example, suppose that one comes into a common room to drink from

a water dispenser where there is only one cup that is washed for the next person to use. Whoever uses the cup, the rule says, should wash it for the next person. The clean cup is a cooperative good maintained by cooperators who comply with the rule to wash it after use. Comparative egalitarianism requires that drinkers should wash the cup in return for its cleanness as earlier drinkers have done. However, if someone uses the cup and does *not* wash it, then inequality comes into being between cooperators who have washed and the one who does not, or between the latter and the following drinker who needs to wash before and after she drinks. It is hard for comparative egalitarianism to appeal to equality in requiring a drinker to wash the cup if there are any non-complying beneficiaries, free-riders. If beneficiaries do their share in order for it to be fair to cooperators, it will not be fair to beneficiaries themselves if there are free-riders. If beneficiaries do not do their share to be equal between them and free-riders, it will not be fair to cooperators. It looks impossible to make it equal to cooperators, beneficiaries, *and* free-riders at the same time.

Nonetheless, the alleged inequality between complying beneficiaries and free-riders does not deny the entire normativity of comparative egalitarianism. The argument that is sensitive to inequality between beneficiaries and free-riders is not strong enough to reject the equality between cooperators and beneficiaries. Even though the compliance of beneficiaries may cause inequality between them and free-riders on one hand, their compliance still serves equality between them and cooperators on the other. Conversely, the non-compliance of beneficiaries may bring equality to beneficiaries and free-riders, but at the same time it causes inequality between cooperators and beneficiaries. Both the compliance and the

non-compliance of beneficiaries generate equality to one side, and inequality to the other side, at the same time. Thus, if comparative egalitarianism that takes seriously equality between cooperators and beneficiaries can only ignore inequality between beneficiaries and free-riders, it can provide an egalitarian justification of the fairness obligation that is to be imposed on beneficiaries.

A moral fact can help comparative egalitarianism focus on equality between cooperators and complying beneficiaries, leaving aside inequality between complying beneficiaries and free-riders. What matters in morality is not whether the compliance or the non-compliance of beneficiaries serves partial equality or impartial equality, but whether the equality it serves is of the right kind or of the wrong kind. In a case where there are free-riders as well as cooperators in a cooperative scheme, beneficiaries cannot claim equality between them and free-riders and go on free-riding because it is abusing equality. Equality of the compliance between beneficiaries and cooperators achieved by the compliance of the former is of the right kind because it is right to do one's share in return for one's benefit. On the other hand, equality of the non-compliance between beneficiaries and free-riders produced by the non-compliance of the former is of the wrong kind because it is wrong not to do one's share in return for one's benefit. Therefore, comparative egalitarianism that requires the compliance of beneficiaries on account of the compliance of cooperators does not have to be sensitive to the alleged inequality between beneficiaries and free-riders *if* it presupposes that equality is not claimed over a moral wrong. And, it will be taken for granted that it is not right for beneficiaries to pass on their share to others, as free-riders do, in the name of equality. The

normativity of comparative egalitarianism is not damaged by the claim about inequality between beneficiaries and free-riders. Comparative egalitarianism can go on as it states because it does not matter if equality between cooperators and beneficiaries prevents equality between beneficiaries and free-riders, which is of the wrong kind.

For example, when Vicky finds it unfair for Anne to leave early when she herself keeps the right time, she should not follow Anne because it is wrong in itself to breach the contract and go home early. Even though Anne does not keep the contract hours, Vicky should keep the right time first because it is right to do so and second because there are other cleaners who keep the right time. The non-compliance of Vicky cannot be justified on the basis of the equality of breaching the contract, which is of a morally wrong kind. Therefore, when she follows Anne and leaves early, she not only breaches her contract but also breaks the equality between her and other cleaners who stay and keep the right time.

Thus, it is of critical importance that equal compliance is not only sensitive to prospective inequality but also dependent on the rightness of the compliance. If equal compliance is sensitive only to prospective inequality, it cannot avoid the problem of inequality caused by the presence of free-riders. Equal compliance can avoid the problem of inequality between beneficiaries and free-riders by appealing to the rightness of the compliance. Equality cannot be rightly claimed between non-complying beneficiaries and free-riders; it is not right to pass on one's burdens to others in the name of equality. Therefore, equal compliance must be sensitive to inequality between the compliance of cooperators and the non-compliance of beneficiaries, *and also* dependent upon

the rightness of the compliance in order to be able to ignore inequality between the compliance of beneficiaries and the non-compliance of free-riders.

As Carr argues, equal treatment that appeals to ‘logical consistency’ may be ‘horrible treatment’ (Carr 2000: 30-35). He finds it ‘horrible’ that ‘P should treat S terribly because he has already treated R terribly and S is relevantly similar to R’ (ibid. 31). According to Carr, ‘while logical consistency may be a virtue in mathematics, it is hardly a virtue when it comes to moral matters’ (ibid. 31). ‘Logical consistency’ may work as a moral reason for requiring beneficiaries to do their share on condition that it requires a morally right action. That is, equal compliance based on comparative egalitarianism can become operative if and only if it is right for beneficiaries to comply with relevant rules. Equal compliance is sensitive to prospective inequality and also dependent on the rightness of the compliance.

In sum, while universal egalitarianism suffers from the problem of free-riders, comparative egalitarianism survives it. It is not promising to appeal to universal egalitarianism when the fair equality thesis persuades beneficiaries to do a fair share if they know that some other beneficiaries do not actually do their share. Beneficiaries are not convinced by universal egalitarianism that requires compliance of all beneficiaries but cannot ignore the non-compliance of free-riders for its own thesis. On the other hand, comparative egalitarianism focuses on the compliance of cooperators in requiring beneficiaries to do their share, without worrying about the non-compliance of free-riders as it is a moral wrong which we cannot claim to justify by appealing to equality. The fair equality thesis is better based on comparative egalitarianism, which is sensitive to

inequality between the compliance of cooperators and the non-compliance of beneficiaries while it does not have to be sensitive to inequality between the compliance of beneficiaries and the non-compliance of free-riders.

3.3.3.A comprehensive justification

The normative premise of the fair equality thesis has been justified by comparative egalitarianism, which asserts that both beneficiaries and cooperators should equally do their share, and both cooperators and fellow or future cooperators should equally do their share. Following Raz who suggests a comprehensive justification, the fair equality thesis justifies cooperators' doing their share as well as beneficiaries' doing their share, both on the basis of equal compliance between the parties.

However, when the fair equality thesis justifies cooperators' doing their share for a comprehensive justification of beneficiaries' doing their share, it appeals to comparative egalitarianism which is sensitive to inequality between the parties, i.e., between cooperators and fellow or future cooperators. In other words, the justification of cooperators' doing their share has not been made in the comprehensive sense, but only in the comparative sense. Because cooperators' doing their share is justified with reference to equality between them and fellow or future cooperators, fellow or future cooperators' doing their share needs to be justified again for a comprehensive justification of cooperators' doing their share and ultimately for the justification of beneficiaries' doing their share.

Thus, the justification of beneficiaries' doing their share cannot be a fully comprehensive one until cooperators' doing their share is justified in the

sense that is not comparatively egalitarian. That is, cooperators' doing their share should not be justified by saying that cooperators should do their share because their fellow or future cooperators will do their share, but by a non-comparative reason.

It is important to make a comprehensive justification because a justification made only on the basis of equality may cause equality of a moral wrong. According to the fair equality thesis that refers to comparative egalitarianism, Vicky in a previous example should be able to leave early because Anne leaves early, for the sake of equality between them. However, by equally leaving early, both Anne and Vicky equally breach the contract, which is not fair to their employer. In addition, if the fair equality thesis employs comparative egalitarianism for a justification of Vicky's leaving early and maintains that Vicky should be able to leave early because Anne leaves early and that Anne should be able to leave early because Mary leaves early, there will no end to the justification of anyone's leaving early.

I suggest that cooperators have a natural duty to do their share no matter whether their fellow cooperators do their share. If we justify the compliance of cooperators on the basis of a natural duty, we can put an end to the justification of beneficiaries' doing their share and make a comprehensive as well as comparative justification. Vicky should stay until the contract hour because Anne stays until the same hour (a comparative egalitarian justification); Anne should stay until the hour because it is right for her to do so; and we have a comprehensive as well as comparative justification of Vicky's keeping the right time. In the same light, beneficiaries should do their share because cooperators

do their share (a comparative egalitarian justification); cooperators should do their share because it is right for them to do so (a comprehensive justification).

3.4. THE FAIR EQUALITY THESIS: ITS CONCLUSION

The fair equality thesis holds that beneficiaries should do their share when and if there are cooperators who do their share. It has been proved that there are cooperators who do their share. Also, the theses that cooperators should do their share and that beneficiaries should do theirs, both being sensitive to prospective inequality and dependent upon the rightness of compliance, have been justified. Therefore, the fair equality thesis can draw a conclusion: beneficiaries should do their share.

It is important to note that the fair equality thesis is dependent on the rightness of the compliance in order to survive the problem of inequality between the compliance of beneficiaries and the non-compliance of free-riders. This further means that the ideal of equality is not sufficient on its own to justify the principle of fairness. It is not sufficient for the fair equality thesis to state that if cooperators do their share to produce some goods then beneficiaries of the goods should also do their share. If the fair equality thesis appeals only to equal compliance, then beneficiaries should be allowed not to do their share as free-riders do not do theirs, for the sake of equality. The fair equality thesis has to refer to the rightness of compliance; it is right for one to do one's share in return for one's benefit.

In addition, for a comprehensive justification, the fair equality thesis needs to rely on the idea that there is a natural duty for cooperators as beneficiaries of their fellow or future cooperators to do their share in the scheme. This supports the idea that the fair equality thesis is dependent upon the rightness of the compliance of cooperators as beneficiaries.²⁷

The importance of the rightness of compliance suggests that the duty to do one's share in return for one's benefit has priority over equal compliance between cooperators and beneficiaries. In the absence of the presupposition that there is a natural duty for beneficiaries to do their share, the fair equality thesis will suffer from the problem of inequality between the compliance of beneficiaries and the non-compliance of free-riders and the problem of the endless justification of beneficiaries' and cooperators' doing their share. Therefore, it should be concluded that beneficiaries should do their share if and because cooperators do theirs *on condition that* beneficiaries and cooperators are naturally required to do their share irrespective of whether equal compliance is in place to justify the fairness obligation.

Nonetheless, the fair equality thesis, better construed as comparative egalitarianism which is dependent upon a natural duty, does not have to abandon its core idea of equality. The fact that the fair equality thesis is dependent on there being a natural duty for beneficiaries and cooperators to do their share does not mean that the fair equality thesis has no purchase at all. There has been a

²⁷ In a similar sense, Weinreb argues that 'a claim to "equal treatment" depends on an underlying ground of desert or entitlement, while a desert- or entitlement-based claim need not depend on a consideration of equality' (Weinreb 1987: 164).

debate about the idea of prescriptive equality as a principle to which decision-makers should refer in deciding equal cases²⁸. The debate, because it focuses on how an institution should treat equal cases equally, has little to do with the fair equality thesis, which suggests a principle that requires individuals to do certain acts. However, there are still insights that can shed some light on the status of the fair equality thesis.

One of the cases where the debate about prescriptive equality takes place is the one in which while B has been treated perhaps by mistake in a way that unjustly advances her advantage, A is going to be treated under similar relevant conditions. Here the question is: should A be treated in the way that equally unjustly increases his advantage? Those who believe in prescriptive equality hold that A should be treated equally in the same way that B has been treated, i.e., unjustly. Non-egalitarians claim that it causes injustice to treat A equally unjustly according to prescriptive equality. Although I subscribe to both the egalitarian and the non-egalitarian principle of treatment²⁹, I do not get involved in this debate because the fair equality thesis is concerned with an individual's obligation to comply with the rules of a cooperative scheme from which she

²⁸ Westen (1982), Greenawalt (1983), Weinreb (1987: 163-166), Peters (1997), Greenawalt (1997), Holmes (2005), and Alm (2010).

²⁹ I subscribe to the egalitarian principle in the sense that I think that A should be equally treated as B has been, i.e., A should be *mistakenly* treated in the way that advances his advantage exactly as B has been treated so. If it is by mistake that B has been unjustly treated, then it should be equally by mistake that A is treated unjustly. If it is on purpose that B is unjustly treated in her interest, then the question should not be whether A should be unjustly treated equally on purpose, but whether it is right to treat B and A unjustly, in which sense I subscribe to the non-egalitarian principle.

benefits.

If beneficiaries have a natural duty to comply with relevant rules, then is the fair equality thesis of no use at all? Weinreb maintains that ‘no additional reference to equality is needed’. He argues as follows:

Despite the absence of a settled principle or rule considered abstractly, the treatment of the other person is significant *only as* evidence to establish one’s independent claim... The effect of the comparison may be to shift to the burden of proof, not because equality of treatment is an independent moral consideration, but because it is presumed that the actor has acted according to principle and no relevant difference is apparent (Weinreb 1987: 164-5, italics added).

According to Weinreb, the only function that comparative equality can perform is to show the evidence that it is right to do what is naturally required.

As the discussion in this chapter shows, it is the case that a natural duty is an independent reason for beneficiaries to comply with relevant rules and that the fair equality thesis is dependent upon this independent natural duty. However, it does not follow that the fair equality thesis is made redundant in the sense that there is no room for the thesis to play a role. The fair equality thesis can offer an egalitarian reason to impose the fairness obligation upon beneficiaries, which carries normative force; beneficiaries should comply with relevant rules when and because cooperators have done so. The fact that cooperators have complied with relevant rules in return for their benefit has some normative force to hold that beneficiaries should comply with the same rules. The fact that other cleaners keep the contract hour is a good reason for Vicky to stay until the contract hour

despite Anne who breaches the contract. Even though it does not offer an exclusive reason, the fair equality thesis still has a purchase.

However, Vicky cannot make a claim for her leaving early as Anne does, on the basis of the equal breach of the contract. The fact that Anne breaches the contract is not a good reason for Vicky to do equally the same. Even comparative egalitarians would not support Vicky in breaching the contract just as Anne does. If Anne leaves earlier than the contract hour by mistake, Vicky should be able to do the same equally by mistake; however, not on purpose. If Anne breaches the contract hour on purpose, Vicky cannot do the same appealing to equality, because it is not the problem of equality but the problem of justice or rightness that they breach the contract. While it is the problem of equality whether beneficiaries should comply with relevant rules just as cooperators have done so, it is the problem of justice or rightness whether beneficiaries should not comply with relevant rules just as free-riders have not done so. In this light, the fair equality thesis can provide an egalitarian reason for beneficiaries to comply with relevant rules while it should depend upon there being a natural duty for them to do so.

In sum, according to the fair equality thesis of the principle of fairness, beneficiaries of a cooperative scheme in which cooperators have complied with the rules have the fairness obligation to comply with the rules: first because it is right to do so, and second because equal compliance between cooperators and beneficiaries can be achieved by their doing so.

3.5. CONCLUSION

The fair equality thesis, a second interpretation of mutuality of restrictions as a moral foundation of the principle of fairness, holds that beneficiaries of a cooperative scheme in which cooperators have complied with the rules have an obligation to comply with the rules for the sake of equality, equal compliance. The thesis is better supported by comparative egalitarianism that is sensitive to inequality between the compliance of cooperators and the non-compliance of beneficiaries. However, it has been noted that beneficiaries must have a natural duty to do their share irrespective of whether their compliance brings about fair equality to cooperators, in order that the thesis can avoid the problem of the unequal compliance between complying beneficiaries and free-riders and the problem of the endless justification of beneficiaries' doing their share. The fair equality thesis can justify an obligation for beneficiaries to do their share by appealing to comparative egalitarianism as long as it is presupposed that there is a natural duty to do one's share. This eventually implies that beneficiaries of a cooperative scheme should comply with the rules of the scheme first because it is right to do so and second because equal compliance can be achieved between them and cooperators by doing their share.

The conclusions of the last and the current chapter are the same in their basic idea; a natural duty to do one's share in return for one's benefit has to be presupposed before the right of cooperators and equality between cooperators and beneficiaries can play a role in grounding the moral foundation of the principle of fairness, which implies that the natural duty has priority over both

the right and the equality. However, it is yet to be discussed how beneficiaries come under such a natural duty, which is the main task of the following chapter.

4. MORAL FOUNDATIONS OF THE PRINCIPLE OF FAIRNESS III: FAIRNESS AS RECIPROCITY

In some cases
one's due is determined independently of that of other people.

(Feinberg 1974: 298)

It is not reciprocity, in the sense of giving and receiving the same sorts of things.

Rather, it is reciprocating
each other's adherence to the same basic rules.

(Goodin 1992: 26)

4.0. INTRODUCTION

The last two chapters examined the right of cooperators and equality between cooperators and beneficiaries as potential moral foundations of the principle of fairness and concluded that beneficiaries have the fairness obligation first because it is right for them to have it and because the right of cooperators and equality between cooperators and beneficiaries can be protected or achieved by their having it.

In search of the moral foundation of the fairness obligation that is to be imposed on *beneficiaries*, the focus has been on cooperators and the relationship between cooperators and beneficiaries. The right of cooperators and equality of compliance between cooperators and beneficiaries are instrumental reasons for

the fairness obligation to be imposed on beneficiaries; *in order to* protect the right of cooperators and *so as to* avoid inequality between cooperators and beneficiaries, the latter ought to do their share.

However, as it has been discussed so in the last two chapters, both right and equality work as a moral foundation for the principle of fairness *on condition that* there is a duty for beneficiaries to do their fair share. Having discovered that both right and equality are dependent upon the natural duty for beneficiaries to do their fair share, it is natural to concentrate on the beneficiaries themselves. The question is once again: why should *beneficiaries* be morally bound to do their share by obeying the rules of a cooperative scheme that makes goods available to them? Why should beneficiaries do their share no matter whether other beneficiaries (cooperators or free-riders) do or don't do their share? What is the primary and fundamental, not instrumental, reason for beneficiaries to do their share?

This chapter suggests *fairness as reciprocity* as a moral foundation of the natural duty for beneficiaries to do their share in return for their benefit; roughly speaking, it is fair that beneficiaries reciprocate the benefit they receive from an effort of cooperators. In other words, beneficiaries are not allowed to free-ride on others' effort. 'No free-riding' is one of the basic ideas of the principle of fairness. A basic idea of the principle of fairness, mutuality of restrictions, has been examined thus far and shown to be dependent upon the basic idea of no free-riding, i.e., it is wrong to benefit without doing one's share. This is reflected in the idea of reciprocity. As fairness as reciprocity is analysed in this chapter, the idea of no free-riding will be endorsed as a basic idea of the principle of fairness;

however, fairness as reciprocity will contain more than the idea of no free-riding.

The chapter runs as follows. Section 4.1 explores two kinds of fairness and suggests that the concept of reciprocity is the right idea for the discussion of the natural duty to do one's share, which ultimately supports the moral foundation of the principle of fairness. In Section 4.2, fairness as reciprocity, which is similar to Rawls' fair reciprocity in its primary idea, is shown to require beneficiaries to do *their own share* regardless of whether other beneficiaries do theirs. Section 4.3 discusses how fairness as reciprocity requires *a fair share*, which is to do a return for one's benefit by complying with the rules. Finally, Section 4.4 argues that fairness as reciprocity that requires one's fair share is to be geared to the fairness obligation by the fact that one benefits from a cooperative effort of others. Section 4.5 draws a conclusion by readdressing the question of the moral foundation of the principle of fairness with closing remarks about the preceding discussions.

4.1. TWO KINDS OF FAIRNESS

Broome discusses fairness in relations between people. According to him, 'fairness is concerned only with how well each person's claim is satisfied *compared with* how well other people's are satisfied' (Broome 1990: 95, his italics). In order for fairness to be at issue, there has to be a claim from a person, and at least two claims from different persons, so they can be 'weighed against each other' (ibid. 95-96). If one does not get a good that one has a reason to

value but has no claim to, one ‘suffers no unfairness’ (ibid. 94), according to Broome. The whole point of fairness for Broome is not that claims should be satisfied but that claims should be treated like other claims. He says that:

It is not *unfair* if they [claims] are not [satisfied], provided everyone is treated proportionally... The essential point is that fairness prescribes how far each person’s claim should be satisfied *relative to* the satisfaction of other people’s claims (Broome 1991: 95, 196, his italics).

In fact, Broome reduces fairness to equality; ‘take a case where all the candidates for a good have claims of equal strength. Then fairness requires *equality* in satisfaction’ (ibid. 95, my italic). That is, ‘equality in satisfaction’ of claims from different people is the aim of his concept of fairness.

Having argued that ‘the theory that fairness is the proportional satisfaction of claims is false’, Hooker rightly concludes that ‘fairness is more than merely equal and impartial application of rules’ (Hooker 2005: 349-350). He does not reject entirely ‘formal or comparative fairness’ – ‘applying the same rules impartially and equally to each agent’ (ibid. 329) – but denies that ‘fairness always involves proportionality’ (ibid. 340). Hooker asserts that proportional satisfaction of claiming reasons depends upon whether there are any ‘side-constraints’ or what kind of moral reasons they are. ‘Side-constraints’ override proportional satisfaction of claims; to take his example, even though I need your liver for my life, I should not take your liver without your permission, and the liver cannot be proportionally divided between you and me, we cannot decide by lottery either (ibid. 337). It is fair for you to keep your liver against my claim

even though my claim is not accepted. Fairness is not all about proportional balance between different claims, and may bring about dissatisfaction of a claim depending on ‘side-constraints’ or moral reasons underlying claims.

Similarly, Feinberg distinguishes between ‘comparative and noncomparative justice’ and says that there are cases of noncomparative justice. According to him,

in some contexts, an individual’s rights or deserts alone determine what is due him, and once we have come to a judgment of his due, that judgment cannot be logically affected by subsequent knowledge of the condition of other parties. When our task is to do noncomparative justice (as we might call it) to each of a large number of individuals, we do not compare them with each other, but rather compare each in turn with an objective standard and judge each “on his own merits” (Feinberg 1973: 98).

When there are compatible claims, it is hard to achieve comparative fairness. For example, when there are cooperators who pay the TV licence fee and free-riders who do not, beneficiaries of the TV service cannot achieve comparative fairness to both cooperators and free-riders at the same time whether or not they themselves pay. Comparative fairness between cooperators and beneficiaries causes comparative unfairness between beneficiaries and free-riders. One way to achieve fairness in this case is to appeal to noncomparative fairness which requires that beneficiaries should do their own share *even if* there are free-riders who do not do theirs. Thus, it is fair for beneficiaries to do their share no matter whether there are cooperators who do their share and/or there are free-riders who

do not do their share.

It is useful to use Suranovic's grouping of different forms of fairness. He groups varieties of fairness into two types (Suranovic 2000):

- Equality fairness
- Reciprocity fairness

It is fair to treat people equally, other things being equal, while it is also fair for one to repay one's benefit. The latter is based on reciprocity whilst the former on equality. Both reciprocity and equality are fair, but in different senses. Equal compliance is fair with regard to the relation between the parties. Reciprocity is fair with reference to the interaction of benefit and burden. However, equal compliance has been examined and it was shown, in the last chapter, to apply as a moral foundation of the fairness obligation *on condition that* it is right for beneficiaries to comply with the fairness obligation, which is based on the ideal of reciprocity. This chapter therefore examines the concept of reciprocity as the primary and fundamental reason for the fairness obligation.

Reciprocity is not all about fairness, but it makes a strong case for fairness, fairness in requiring burden in return for benefit. It is highly likely that reciprocity can be a reason to which fairness responds in cases where there is an interaction of benefit and burden. If the focus is on the distribution of goods or burdens, reciprocity would not have much room to play a role. Theories of justice as fairness, impartiality, mutual advantage, desert, or need might apply to the distribution of goods or burdens. But the ideal of reciprocity has to do with an interaction of benefit and burden. It is not a matter of distributing goods or

burdens but of requiring a burden in return for a benefit that is at issue in the discussion of the principle of fairness. As such, reciprocity is the right concept to be discussed in detail as a promising moral foundation of the natural duty to do one's share. The case that reciprocity makes for fairness starts from the study of reciprocity in general. However, this is not going to be comprehensive but will be focused on its pertinence with regard to the fairness obligation.

4.2. FAIRNESS AS RECIPROCITY: ONE'S OWN SHARE

This section suggests doing *one's own share* as a requirement of fairness as reciprocity, a reason for beneficiaries to do their share irrespective of the compliance of other beneficiaries. The concept of reciprocity is analysed, similarly to Rawls' fair reciprocity, to be unilateral and non-relational; thus beneficiaries are required to do their *own* share. 'One's own share' is compared with interpretations pronounced by White and Murphy.

4.2.1. One's own share, unilateral

Anthropologists have shown great interest in the concept of reciprocity. MacCormack argues for the distinction between *reciprocity* and *exchange* as the latter refers to 'a state of affairs' while the former 'a necessary condition for the survival of the society' (MacCormack 1976: 101). He understands reciprocity as a normative form of mutual exchange in society. In recapitulating Sahlins' 'tripartite scheme of reciprocities', MacCormack highlights 'the characteristic of

reciprocity' as 'the existence of two distinct parts or sides to a transaction' (ibid. 98). According to his explication, reciprocity as a noun is, by definition, a concept of mutuality, in which both parties give and take. In our language, reciprocity is the normative form of mutual exchange between benefactors and beneficiaries. Mutual exchange is aimed at balance or equilibrium (Becker 1986: 82), which presupposes more than one party. The aim and the motive of reciprocity have been supposed to be equilibrium between the parties.

When it comes to the concept as a verb, however, to reciprocate is an act expected from a recipient (Schmidtz 2006: 82; Becker 1986: 93, 139). For this reason, fairness as reciprocity is a *unilateral* concept rather than a concept of mutuality, at least in the discussion of the fairness obligation. There are different pairs of opposite parties in *mutual exchange*; giver and taker, benefactor and beneficiary, seller and buyer, supplier and demander, and so on. On the other hand, in *reciprocal activity*, there is only one party who is both giver and taker, both beneficiary and benefactor. In the provision of cooperative goods, people use the goods, do their share, and then become cooperators, or they use the goods, do not do their share, and then become free-riders; there are no mere benefactors. We may say that all cooperators benefit one another, but it is not the case that there are benefactors on one side and their beneficiaries on the other side. Rather, every cooperator is both beneficiary and benefactor at the same time. It is every beneficiary who is required to reciprocate in return for benefit.

I owe Gouldner (1960) the unilateral property of fairness as reciprocity. As a sum of a distinction between *reciprocity* and *complementarity*, Gouldner writes 'in short, complementarity connotes that one's rights are another's

obligation, and *vice versa*. Reciprocity, however, connotes that *each* party has rights *and* duties.’ (1960: 169, his italics) And then he adds an explanation:

were there only rights on the one side and duties on the other, there need be no exchange whatsoever. Stated differently, it would seem that there can be stable patterns of reciprocity *qua* exchange only insofar as *each* party has both rights and duties. In effect, then, reciprocity has its significance for *role systems* in that it tends to structure *each* role so as to include both rights and duties (ibid, his italics).

In other words, *reciprocity* and *complementarity* are similar to each other in bringing about equilibrium, but *complementarity* is designed for balance between benefactor and beneficiary while *reciprocity* aims at equilibrium between benefit and burden. The burden shouldered by one party needs to be counterbalanced by that on the other according to *complementarity*. On the contrary, for the sake of reciprocity, the benefit enjoyed by one party needs to be offset by the burden on the same party.

4.2.2. One’s own share, non-relational

Fairness as reciprocity is not relational but non-relational. This is because beneficiaries do not reciprocate in relation to cooperators but by themselves. The goods in question are already there spread for beneficiaries to receive, take, use, or enjoy. As such, beneficiaries should be required to do their share *in return* for their benefit. In a logical sense, beneficiaries do not benefit and share burden at the same time, let alone share burden and then benefit; rather, they benefit *and*

then are to bear burden. Also, cooperators as beneficiaries themselves just do their own share *in return* for their benefit, as a result of which the goods are made and kept available to beneficiaries, who should also be required to do their share *in return* for their own benefit. No matter whether they are cooperators or beneficiaries, those who enjoy cooperative goods without their own effort are to do their share in return, not to give and take in relation to others.

All that matters in fairness as reciprocity is that beneficiaries should make a return for their benefit. And this does not indicate whether beneficiaries should do their share directly toward their original benefactors. It is ‘complementarity’ that requires beneficiaries to do their benefactors a favour in recompense for the benefactor’s burden. In contrast, fairness as reciprocity requires beneficiaries to do their share in return for their benefit. In the principle of fairness where beneficiaries benefit from the compliance of cooperators with relevant rules, beneficiaries may owe their *benefit* to cooperators, without whose compliance it is not possible for there to be cooperative goods. However, beneficiaries do not owe *the fairness obligation* to cooperators. It is not the case in the principle of fairness that beneficiaries are required to make a return *to* cooperators. Precisely speaking, beneficiaries are not to repay the compliance of cooperators, but only to do their part in a scheme of cooperation just as cooperators as beneficiaries did theirs.

In this sense, Sangiovanni’s understanding of reciprocity is not eligible for the discussion of the fairness obligation. According to his conception of fair reciprocity, ‘others are owed a fair return for what they have given you, just as you are owed a fair return for what you have given others’ (Sangiovanni 2007:

26). On the basis of this conception of reciprocity, Sangiovanni argues for ‘reciprocity-based internationalism’ of justice, which holds that

we owe obligations of egalitarian reciprocity to fellow citizens and residents in the state, who provide us with the basic conditions and guarantees necessary to develop and act on a plan of life, but not to noncitizens, who do not (ibid. 20).

In the principle of fairness, however, both we and fellow citizens owe a fair return for what we and they respectively are already given, and we do not owe it (a fair return) to our fellow citizens even though we owe our fellow citizens *what we benefit from their effort*. It is right to say that we do not owe non-citizens the fairness obligation, but it is not right to say that we owe it (the obligation) to our fellow citizens. Beneficiaries owe it to neither non-cooperators nor cooperators.

It is very important to distinguish between *reciprocity* and *complementarity* as regards the agents of reciprocity. If we understand fairness as reciprocity at a theoretical level, it is easy for us to confuse it with *complementarity*. In its theoretical form, fairness as reciprocity can be understood as mutual exchange between both parties; giver and taker, buyer and seller, supplier and demander, benefactor and beneficiary, and so on. Thus, fairness as reciprocity is mistakenly regarded as an action of both parties. The fact that one party is to reciprocate presupposes that there is another party who has supplied the benefit in question; it is natural to imagine both parties in an action of reciprocity. However, this is a result of confusion between fairness as reciprocity and complementarity. While there are different beneficiaries and

benefactors in complementarity, there is only one party who is both beneficiary and benefactor in fairness as reciprocity. Every TV licence payer is both beneficiary and benefactor of the service. Fairness as reciprocity is a matter of balancing between benefit and burden by an identical agent.

To figure out *how much* burden beneficiaries should bear, it may well depend on how many potential cooperators there are. In order to identify the appropriate burden to be undertaken, we may need to take into consideration the total number and the overall capacity of cooperators. In this sense, fairness as reciprocity seems to refer to the facts about cooperators with regard to the identification of the burden to be imposed on beneficiaries. However, it is one thing to figure out *how much* share beneficiaries should have while it is another to understand *why* beneficiaries should do their share. Information about cooperators is pertinent to the former but not to the latter. As far as a moral basis of one's share is concerned, beneficiaries should do their own share regardless of whether their compliance has anything to do with cooperators.

4.2.3. Fairness as reciprocity and Rawls' fair reciprocity

Fairness as reciprocity for the principle of fairness seems to distinguish itself from Rawls' fair reciprocity, but, fundamentally, they share the same idea. According to Rawls, reciprocity, which is an idea included in his difference principle, 'is a moral idea situated between impartiality, which is altruistic, on the one side, and mutual advantage on the other' (Rawls 2001: 77). Gibbard takes Rawls' fair reciprocity to be distinct both from Barry's justice as impartiality in the sense that fair reciprocity allows the expansion of the

advantage of both the more advantaged and the least advantaged. He takes it to be distinct from Gauthier's justice as mutual advantage which is motivated by egoism while fair reciprocity is motivated by non-egoism (Gibbard 1991: 266). As Rawls agrees with Gibbard, his justice as fairness 'perches between [impartiality and mutual advantage] on reciprocity' (Rawls 1993: 17), which is implicit in his difference principle; the naturally and socially advantaged are allowed to enlarge their advantage only in the way that also increases that of the least advantaged. In other words, beneficiaries of natural and social advantages are required to advance the good of all, particularly the good of the least advantaged, because natural and social advantages are 'a common asset' (Rawls 2001: 124) which no particular individuals deserve. That is, the better endowed are to reciprocate their natural and social endowments for the interest of all, and the most for the least endowed.

In the sense that the better off are required to increase the advantage of the worse off by increasing their own advantage, Rawls' fair reciprocity looks different from fairness as reciprocity that requires one's own share in return for one's own benefit. However, the reason why the better off are required to do so is *not* interpersonal; it is because they do not deserve the advantage as it is not fully due to their own effort. The better off are required to make a return for their natural and social endowments, which do not belong exclusively to them and thus should be distributed among all, particularly the worse off. It is not because the better off are required to augment the wealth of the less advantaged that they are to reciprocate, but because they are not entitled to possess the advantage which is not wholly attributable to themselves. Rawlsian agents reciprocate

natural and social endowments for the sake of neither impartiality nor mutual advantage; it is a duty of its own for them to do it.

Similarly, fairness as reciprocity does not employ the concept of reciprocity *in order to* set up fair relationship among everyone or between beneficiaries and cooperators. Fairness as reciprocity neither seeks mutual advantage nor pursues altruism, let alone egoism, but appeals to ‘one’s own share’. Beneficiaries are not required to enhance mutuality of disadvantage by complying with relevant rules as cooperators do, but to make a return for what they receive without having done their share. The purpose of fairness as reciprocity is not to achieve mutuality of disadvantage between them and cooperators but for them to make a return for their own benefit. Beneficiaries are required to reciprocate as doing so is right in itself. In this sense, fairness as reciprocity is not based on the concept of reciprocity as an interpersonal virtue, but as an impersonal value, similarly to Rawls’ fair reciprocity.

4.2.4. One’s own share for fair advantage

Becker does not base his concept of reciprocity on altruism (1986: 98) but on, and aiming at, mutual advantage (ibid. 112). He considers reciprocity as ‘reciprocal transactions’ between people that are themselves ‘instrumental necessities in our lives’ (ibid. 90). According to Becker,

the purposes [of reciprocity] are the promotion of the social equilibrium, self-esteem and social exchange required for a productive life – a productive life for all rational agents, under the presumption of equality (ibid. 134).

Reciprocity is a moral requirement for him as ‘its purpose is to sustain mutually advantageous exchanges’ (ibid. 112).

In contrast to reciprocity for mutual advantage, fairness as reciprocity does not pursue mutual advantage, but *fair advantage*. When beneficiaries do their share as fairness as reciprocity requires, they do not enlarge their own advantage. It is more advantageous for beneficiaries not to do their share in return for their benefit. If they do their share, their net benefit will be smaller than when they do not. Thus, fairness as reciprocity is not designed to promote the advantage of beneficiaries. The purpose of fairness as reciprocity is fair advantage for beneficiaries; beneficiaries will benefit no more than their fair due by complying with the fairness obligation.

At the same time, cooperators obtain fair advantage when beneficiaries do their share. If beneficiaries do their share, the overall benefit for cooperators will be greater than when the former did not do their share. Although a trivial number of free-riders would not actually increase the whole cost of producing the goods in question, cooperators would carry a smaller burden and thus they will enjoy a greater advantage when all beneficiaries do their share and share the whole burden. Fairness as reciprocity that requires one’s own share, therefore, achieves *fair advantage* for both beneficiaries and cooperators.

4.2.5. One’s own share by White

In his reciprocity principle, White also argues for doing one’s own share. The reason for this, however, is different from that required by fairness as reciprocity.

His reciprocity principle holds that

where the institutions that govern economic life are sufficiently fair in terms of the opportunities they afford for productive contribution, and the awards they apportion to it, those citizens who claim the high share of the social product available to them under these institutions have an obligation to make a decent productive contribution, proportionate to their abilities, to the community in return (White 2003a: 49).

In elaborating the reciprocity principle, White appeals to ‘democratic mutual regard’ (ibid. 50), which is expected to lead to ‘reasonable mutual advantage’ (ibid. 62). The reason why reciprocity matters for White is that non-reciprocity would lay burdens on others. He believes that

certainly, citizens who have democratic mutual regard for each other would, as an expression of their regard for other citizens as their equals, want to share these costs and not offload them onto others (ibid. 61).

White places on beneficiaries ‘the contributive obligation’ in order not to pass extra burden onto cooperators on the assumption that non-reciprocity by beneficiaries ‘offloads extra burden on cooperators’. It must be right to do one’s own share, but the reason for White to do it is ‘democratic mutual regard’ between citizens; democratic citizens have a duty not to dump their own burden onto others. Doing one’s own share derives from his concern that a failure to do it would unfairly disadvantage cooperators. In this sense, White’s conception of

reciprocity is based on the interest right of cooperators³⁰ or a duty not to disadvantage others.

In contrast, beneficiaries are required to do their own share because it is right in itself to do so in return for their benefit, according to fairness as reciprocity. Regardless of whether non-reciprocity causes extra burden on cooperators, fairness as reciprocity requires beneficiaries to do their own share, appealing to the rightness of doing so. In particular, when non-reciprocity is not always a cause of extra burden for cooperators, fairness as reciprocity is better at securing the fairness obligation than White's reciprocity principle. Although non-reciprocity of a considerable number of beneficiaries will be aggregated to cause significant extra burden on cooperators, non-reciprocity of any particular beneficiary would create little extra burden on cooperators. For example, the non-payment of income tax by one person in a country would not place an extra burden on others in sustaining their national security. In this case, it is hard to force a beneficiary to do her share on the basis that her non-reciprocity would 'offload extra burden on cooperators'. According to fairness as reciprocity, however, every single beneficiary may well be required to do her own share *in return for her benefit*.

4.2.6. One's own share by Murphy

When Murphy argues that beneficiaries should do no more than their own share, he seems to appeal to fairness as the reason why beneficiaries *should* do their share; 'the proper way to distribute responsibility for the pursuit of a moral aim

³⁰ See pages 64-5 in this thesis.

among agents is to distribute it fairly' (Murphy 2000, 89). However, he employs the notion of fairness to require beneficiaries to do *no more than* their own share; 'it is natural to think that it is unfair, or at least inappropriate, to require agents, under partial compliance, to exceed that fairly allocated responsibility' (ibid. 93). Murphy proposes 'one's own share' so as to require beneficiaries to do no more than their share. For him, doing one's own share is independent of the failure of cooperators to do their share.

Fairness as reciprocity shares with Murphy indifference about the failure of free-riders to do their share. However, fairness as reciprocity should not be confused with 'moral demands in nonideal theory' discussed by Murphy (1993; 2000). The moral foundation of doing a fair share is explained in his cooperative principle:

each agent is required to act optimally – to perform the action that makes the outcome best – except in situations of partial compliance with this principle. In situations of partial compliance it is permissible to act optimally, but the sacrifice each agent is required to make is limited to the level of sacrifice that would be optimal if the situation were one of full compliance (Murphy 1993: 280).

To put this in our language, the fairness obligation to be imposed on beneficiaries has nothing to do with the non-compliance of free-riders with the requirement. What Murphy tries to figure out in the cooperative principle is not that beneficiaries should do their fair share no matter whether free-riders do their own share or not, but that they should do their share as if there were no free-riders at

all. That is, beneficiaries should do no more than their own share, not any extra share caused by the non-compliance of free-riders. As Murphy puts it, ‘we never were that worried about the *amount* of the demands; instead, we were all along concerned about doing the work of others’ (ibid. 289, his italic). To follow his argument, beneficiaries in the situation of partial compliance (in the presence of free-riders) should be required to do as great a share as they would be in the ideal situation of full compliance.

My understanding of Murphy’s cooperative principle suggests that his principle is to justify how much share one should do, not why one should *do* one’s share. His principle clarifies *the legitimate extent* of doing one’s share, but does not provide us with *the reason* for doing one’s share. He argues only that it is not fair to require beneficiaries to do more than their own share, even where there are free-riders who pass their burden on to others. However, Murphy does not provide beneficiaries with a reason why they have to do their own share. He only suggests that we should not do ‘the work of others’ but one’s share. He leaves open the question of why we should do our own share. With regard to this question, fairness as reciprocity appeals to the rightness of doing one’s own share.

4.3. FAIRNESS AS RECIPROCITY: A *FAIR* SHARE

The share beneficiaries are required to do is *a fair share* as well as their own share. Reciprocity brings about significantly different consequences according to its understanding in a *strict* or a *fair* sense. In a *strict* sense, reciprocity requires

the same return from beneficiaries without taking into consideration the capacity of beneficiaries and benefactors, and the amount of benefit and burden perceived by beneficiaries and benefactors. On the other hand, reciprocity in a *fair* sense, to which fairness as reciprocity subscribes, demands a fair share required in return for benefit by complying with relevant rules because (i) the compliance with the rules provides the goods in question; (ii) the rules treat equally non-members as well as the members of a cooperative scheme; (iii) the rules take into account the capability of beneficiaries; and (iv) beneficiaries can do their own share better by following the rules.

4.3.1. A fair share, not in a strict sense

Buchanan, who understands reciprocity in a strict sense, accuses what he labels ‘justice as reciprocity’ of its obstinacy (Buchanan 1990). He says that there are two different versions of justice as reciprocity: self-interested reciprocity and fair reciprocity, but they are common in having ‘the reciprocity thesis’ that no contribution, then no rights (ibid. 229-230). Fair reciprocity is fair in the sense that beneficiaries do not owe anything to non-cooperators but only to cooperators, according to Buchanan (ibid. 229). He concludes that justice as reciprocity is such ‘a truly radical and severe view’ (ibid. 232) that it does not take into account the capability of different persons.

Buchanan’s use of reciprocity is ‘oversimplified’ with respect to the parties and the object of reciprocity. He understands reciprocity in a strong sense, which is ‘too strong’ according to Arneson. Arneson says that ‘clearly the requirement that the benefit one gives back is equivalent to the benefit one gets

is too strong as it stands' (Arneson 1997: 339). Buchanan understands reciprocity as bearing burden that is to be performed in order to receive benefit. More importantly, in reciprocating in a strict sense, one is qualified to benefit only when one is able to repay and one is to repay to contributors only. In addition, he uses reciprocity as a strict exchange of something for something.

In the principle of fairness, one does not pay for benefit, but one benefits and then repays it. So the main concern of fairness as reciprocity is why burdens should be borne rather than how to distribute benefits in accordance with the corresponding burden. Fairness as reciprocity does not require repayment before one benefits, but afterwards, as the goods in question are non-excludable in their provision. The goods are already distributed, and thus the question is why beneficiaries should be bound to reciprocate in return. The concern of fairness as reciprocity is how legitimately to require beneficiaries to do their share in return for their benefit. The principle of fairness is not a distributive theory, which allocates benefits in proportion to burden-sharing, but a theory of obligation, an obligation to share burden in return for benefit received.

As argued earlier, in the provision of cooperative goods, it is highly likely that some people free-ride on the compliance of others, especially when the provision of the goods is made in the first place. In this case, fairness as reciprocity calls for fairness that is to be achieved between benefit and burden on the basis of the idea that it is fair to bear burden in return for benefit. The share that fairness as reciprocity requires beneficiaries to do is a fair share because the share is a return for benefit they receive without yet doing their share.

One may argue against fairness as reciprocity by pointing out that there

may be a case where non-beneficiaries are required to do a fair share. That is, some people may be required to do a fair share without receiving any benefit. For example, the National Gallery of Art in London is a public good in the UK. It is run from public funds, but not all tax payers visit and benefit from it. Some people in the UK may have never visited the Gallery in their lifetime but have contributed to the public funds, a part of which is allocated for the Gallery. In this case, they have been bearing a burden in return for benefit that they have never enjoyed at all. Fairness as reciprocity seems to require contribution in return for nothing.

It is important to distinguish between a particular good and the whole good that includes the particular good. Basically, non-beneficiaries who have nothing to do with a benefit in question should not be required to do a fair share. Those who do not watch TV are not to be required to pay the licence fee. However, those who do not watch entertainment shows but news and documentary programmes on TV should still pay the fee, a part of which is spent on the production of the programmes that they do not watch. One may not like a particular good which is a part of the good in question as a whole either because of one's preference or because of the way the whole benefit is provided. If one is not interested in paintings, one would not benefit from the National Gallery of Art, which is a part of a package of public goods. If a society pays the unemployed Job Seeker's Allowance, the employed or the self-employed do not benefit from such a public fund although they do contribute to the fund. In this light, Goodin suggests considering a particular good as a part of 'a package' of particular goods.

It is impossible to produce a stable majority for the division of a fixed sum of spoils that all value equally... Any given set of public expenditure policies form such a package, in the first place. If they do, then such people can see clearly enough that they must, in all fairness, take or leave the package as a whole, on an all-or-nothing basis (Goodin 1992: 35-6).

It is technically impossible for one's tax to be used only for the particular good that satisfies one's preferences. It is equally impossible not to produce the goods that all need to some degree even though they do not value them to the same extent. Thus, even though one does not benefit directly from a particular good, one is required to do one's fair share in return for one's benefit for a package that includes the particular good.

4.3.2. A fair share, not the same kind of return

Fairness as reciprocity does not require the same kind of return; it is not 'eye for eye, tooth for tooth'. There are three kinds of return that fairness as reciprocity does not consider to be fair. (1) According to reciprocity in a strict sense, if one watches TV all day long every day seven days a week, one is expected to pay more than someone else who watches only a couple of hours a week. To follow this idea, one needs to bear a burden equivalent to one's benefits. This may be right in commercial transactions, but not in the provision of cooperative goods. Once cooperative goods are supplied, it is entirely up to beneficiaries how much advantage they take of them; some might like watching every programme on TV while others only a couple of programmes, according to their preference. A fair

share is to be made in return for benefit, not for what beneficiaries make of them. Therefore, it is not fair to require beneficiaries to contribute in proportion to how much they enjoy the goods.

(2) One who believes in strict reciprocity may require beneficiaries to bear as much burden as cooperators do. Here are two ways to figure out how much of a share cooperators take: the amount that they think they do and the amount that they are required to make by relevant rules. The extent of the burden required of beneficiaries may be what cooperators *think* they bear. According to reciprocity in a strict sense, it is fair for beneficiaries to bear a burden to the same extent that cooperators think they do because the compliance of cooperators produces the goods for beneficiaries. However, the TV licence fee may be nearly nothing to a billionaire while it is a considerable amount of money to those who live on social security. It is not fair to require a billionaire to pay for the TV licence to the extent that those on social security think they pay; the fee may be 1% of the whole capacity of the latter, which may be £1 million for the former.

3) Strict reciprocity may still require beneficiaries to bear burden as much as cooperators actually do by following the relevant rules. Suppose the TV licence fee is £100 for a year. Then, because cooperators pay £100, beneficiaries should pay the same amount. In fact, some TV watchers pay £100, some half the fee, and some are exempt, according to various conditions; age (capacity or enough contribution), blindness (scope of benefit), and black and white TV (scope of benefit). We cannot require someone, as the current UK TV licence law prescribes, who is older than 75 and has only a black and white TV to pay as

much as one who is 45 years old and has a colour TV. Thus, it is not only unfair but also ineligible to require beneficiaries to bear a burden to the same extent as cooperators actually do.

4.3.3.A fair share, according to relevant rules

Fairness as reciprocity requires beneficiaries to do a fair share, that is, to do their share according to the rules of the scheme from which they benefit, not a share in a strict sense. However, there seems to be a gap between doing one's fair share and obeying the rules because some individuals may be able to do their share without following the rules. According to Durning's sharp examination, defenders of the principle of fairness do not argue for

the claim that those who benefit from a cooperative scheme must do what the rules of that scheme require; instead they argue that such beneficiaries must do 'their part' or their 'fair share' and then they simply assume that this requires those people to do what the scheme itself requires (Durning 2003: 259).

For example, there are many ways in which individuals can help the earth to cool down without necessarily following the rules set up by a scheme. Thus, the principle of fairness needs to explain why individuals are obligated to refer to the rules of a cooperative scheme rather than consult their own judgements about what constitutes doing their own share.

Before discussing the reasons for beneficiaries to follow the relevant rules when they are to do their share according to the principle of fairness, we

need to note that the fairness obligation is not a kind of legal obligation. That is, the principle of fairness does not impose a legal obligation on beneficiaries, an obligation to obey the rules of the scheme from which they benefit, but a moral obligation to do their share in compliance with the rules. Carr understands the principle of fairness as a theory of political obligation that asks ‘whether a person subject to the law has a powerful but not necessarily compelling reason to obey a law simply because it has the status of law and regardless of its content’ (Carr 2002: 2). According to him, the principle of fairness requires beneficiaries to obey the rules of a polity because they benefit from such laws (*ibid.* 6). Also, Carr identifies fairness with ‘fidelity to social practice’ (Carr 2000; 2002: 15). He then argues that the principle of fairness fails to impose a legal obligation to obey relevant rules because ‘the ends and ideals of a polity are not necessarily or incontrovertibly reflected in the laws and policies of the polity’ (2002: 20).

However, fairness as reciprocity does not directly require the obedience to relevant rules of a cooperative scheme from which beneficiaries benefit, but doing a fair share, i.e., doing one’s share in accordance with relevant rules. And there are at least four reasons for obeying the relevant rules when beneficiaries are required to do a fair share.

First, beneficiaries are required to do their own share according to the rules of a cooperative scheme from which they benefit because the goods in question are made available by the compliance of cooperators with the rules. If cooperators did their share according to their own judgement and their shares were not organised by a scheme of cooperation that is governed by some rules, then it would not be possible for the goods to be provided to any beneficiaries. It

is plausible to say that beneficiaries benefit from the compliance of cooperators with relevant rules, because of which they are required to do their share by complying with the rules. Goodin calls this ‘rule-based reciprocity’. He explains:

It is not reciprocity, in the sense of giving and receiving the same sorts of things. Rather, it is reciprocating each other’s adherence to the same basic rules of the market. You have benefited from their sacrifices in adhering to those rules, and it is only fair that you should reciprocate in turn (Goodin 1992: 26).

It is fair for those who benefit from the rules with which others comply to abide by the same rules because others’ compliance with the rules of a cooperative scheme makes the goods in question available to all.

Second, for their legitimacy, the rules of a cooperative scheme should be just and fair in the sense that all beneficiaries are treated equally and consistently, relevant things being similar. In other words, the rules can be just and fair when all beneficiaries follow them. Particularly, beneficiaries are required to comply with the rules, which can then be fair to cooperators who have complied with the same rules.

Third, a fair return that fairness as reciprocity requires takes into consideration the capacity of beneficiaries to do their share and the scope of benefits according to relevant rules. It is fair to require the more capable to do a greater share, the less capable to do a smaller share, and the incapable to do nothing. This does not mean, however, that the incapable do not have to follow relevant rules because they do not have to do their share. A fair return is not to do

as much as beneficiaries are capable of, but to follow relevant rules that take into account various capacities.

A question may arise: should a billionaire do her share to the extent of her capacity? To this question, fairness as reciprocity points to *minimum capacity*. There will be different capacities that beneficiaries have. Some may have lower than minimum capacity while others reasonably sufficient capacity, and still others excessive capacity. Those who have less than minimum capacity should not be held to the same amount of burden as the others who have more than minimum capacity. However, fairness as reciprocity would not require, for the same benefit, the most capable to do more than their share because a fair share is required in return for the benefit in question, not for their capacity to bear burdens. All beneficiaries who have more than minimum capacity should be required to bear the same amount of burden, no matter whether some have more than sufficient capacity.

In addition to the capability of beneficiaries, the scope of benefits needs to be taken into account in setting up the relevant rules for a fair share. While the amount of benefit has nothing to do with a fair return as it all depends upon how much beneficiaries *would* enjoy from the benefit in question, the scope of benefit matters as it prescribes how much benefit beneficiaries *can* enjoy according to their capacity and the nature of benefit. The scope of benefits varies according to different capacities for deriving benefit from the goods in question, and to different circumstances that allow beneficiaries to enjoy the goods. For example, blind people can only *listen* to TV and a black and white TV is obviously less entertaining than a colour set. It is not fair to require a blind person to pay the

same amount of TV licence fee as a sighted person, and someone with a black and white TV as someone with a colour TV. Those who cannot enjoy the same benefit as much as others do should not be required to take the same amount of the share as others. Those who receive different kinds or amount of benefit should be required to do a different share according to relevant rules that should reflect these differences. Thus, a fair share is to follow the rules of a cooperative scheme that are sensitive to the different capacities of beneficiaries for doing their share and the various scopes of benefits.

Fourth, a better way in most cases to do one's share in a cooperative scheme is to comply with the rules of the scheme because beneficiaries can do their share better by following the rules. Raz suggests 'the normal justification of authority', which can be employed for the justification of the compliance of beneficiaries with relevant rules.

The normal justification thesis claims that the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly (Raz 1986: 53, his italics).

To employ this thesis for the justification of the fair share required by the principle of fairness: the reason for beneficiaries to follow relevant rules instead of just doing their share according to their own judgement is because they will do their share better by complying with relevant rules than by doing it according

to their own judgement. For example, when I drive safely on the road thanks to other good drivers who comply with the traffic rules, I can make a contribution, as required by the fairness obligation, to the scheme for the road safety better by following the traffic rules than by driving as I think best. Compliance with the rules can be justified by this advantage of following the rules.

The normal justification thesis is not to be misunderstood as suggesting that beneficiaries have ‘an independent reason’ to comply with the rules, a reason that has ‘no direct connection to the action for which it is a reason’ (Raz 1986, 35). As Raz reiterates, the normal justification thesis is based on ‘the dependence thesis’, which holds that

all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive (ibid. 47, his italics).

In other words, it is not because the authority of a cooperative scheme requires beneficiaries to follow its rules that they come under the fairness obligation, but because the principle of fairness applies to them irrespective of the authority of the scheme’s rules. To borrow Himma’s example,

someone who drives down the wrong side of the street has committed a serious moral breach, but not because she has disobeyed the authority that issued the directive. The reason she has done wrong is that her act endangers lives because people will generally comply with the directive (Himma 2007: 141).

The reason to follow the rules enacted by the scheme is ‘to pre-empt individual judgment on the merits of a case’ (Raz 1986: 48), and ‘to maximize conformity to *dependent* reasons’ (ibid. 51, my italic). That is, beneficiaries are to comply with the rules of the scheme in order to do their share better than when they follow their own judgment. The main point of the normal justification thesis is to help beneficiaries to do their share in a cooperative scheme.

Because the normal justification thesis is mainly focused on helping beneficiaries to do their share, it is open to other ways to achieve its main purpose than to obey the rules of a cooperative scheme. However, the principle of fairness is *basically* not open to other ways to do one’s share than to comply with relevant rules. Even though the principle of fairness is not a legal theory of obligation to obey the rules, the principle requires beneficiaries to do their share by following the rules for the first three reasons discussed earlier, which are necessary reasons for following the rules. That is, because beneficiaries benefit from the compliance of cooperators with the rules, because all beneficiaries should be treated consistently by the rules, and because the rules take into consideration the different capabilities of beneficiaries to do their share and the various scopes of benefits in question, beneficiaries have an obligation to do their share in accordance with the rules.

However, the principle of fairness is not completely closed to other ways to do one’s share in addition to following the rules. Basically, beneficiaries are required to follow the rules in doing their share, but they can do more of a share than the rules require them to do. For example, some beneficiaries of national

security can do their share by making a huge financial contribution or by inventing a massively powerful weapon, which, nevertheless, may not exhaust their share, according to the conscription rule in their country. Once beneficiaries do their share by following the rules, they are allowed to make a contribution to the scheme of cooperation that produces the goods in question by following their own ways to do it.

4.4. FAIRNESS AS RECIPROCITY, TRIGGERED BY AN ACT OF BENEFITING

Fairness as reciprocity is a normative requirement that one should do one's fair share in return for one's benefit by following relevant rules. However, the principle of fairness is not a theory of natural duty but of an obligation. In order for the principle of fairness to follow from the natural duty requirement, a factual premise is to be satisfied. This may be put as follows:

- Beneficiaries should do their own fair share in return for their benefit.
[Fairness as reciprocity]
- Beneficiaries benefit from a cooperative effort of cooperators.
[Factual premise]
- Thus, beneficiaries should to their fair share. [The principle of fairness]

Fairness as reciprocity is not put into effect until the factual premise is satisfied. The normative requirement has only theoretical normative force, which acquires

practical normative force by the fulfillment of the factual premise. It is basically fair and right for one to do one's own share in return for one's benefit. However, one does not come under an obligation to do a share until one does benefit from a cooperative scheme of others. It is when one becomes a beneficiary that one should do a fair share in return for one's benefit according to the normative requirement of fairness as reciprocity. As Rawls clearly distinguishes between the natural duty of justice and the principle of fairness (Rawls 1971: 343-4), we need a connection between fairness as reciprocity that posits the natural duty to do one's share and the principle of fairness that requires the fairness obligation; and that is the fulfillment of the factual premise.³¹

Notwithstanding, an act of benefiting does not generate the normative force of fairness as reciprocity. It is necessary that one benefits, in order to come under the fairness obligation. This, however, does not mean that one's act of benefiting is the justificatory reason for doing a fair share. Fairness as reciprocity has normative force from the fairness and rightness of its requirement, which is put into practice by an act of benefiting. Even though fairness as reciprocity has potential normative force which can be triggered by one's act of benefiting, the normative force derives from the rightness of doing one's own share and the fairness of doing one's share. Fairness as reciprocity is geared up to the principle of fairness by the fact that one benefits from a cooperative effort of others.

An act of benefiting does not only activate the fairness obligation but

³¹ While Rawls presents 'voluntary acceptance' of benefits of a cooperative scheme as a necessary condition for the principle of fairness, fairness as reciprocity is triggered by an act of simply benefiting. 'Voluntary acceptance' as a candidate condition for the principle of fairness will be discussed in detail in the following chapter.

also shows that beneficiaries should be obligated to do their share according to relevant rules. Having noticed that non-excludable public goods may be ‘unprovided or underprovided’ when everyone tries to free-ride on others’ effort, Goodin argues that people will be motivated to ‘mutually coerce’ themselves according to the logic of reciprocity (Goodin 1992: 29). The worry that necessary public goods would be made unavailable by the non-compliance of people motivates them, according to Goodin, to do their share in return for what their benefit from a scheme of cooperation. However, Goodin misses an important aspect of the provision of public goods; they are provided even before their beneficiaries are obligated to do their share in return. It is more likely that once people benefit from a cooperative scheme of others, they tend not to do their share in return. Beneficiaries are not motivated by the sense of reciprocity at the fear of non- or under-provision of the goods in question; they are rationally motivated to free-ride. Thus, the fact that they benefit from a cooperative scheme of others before they are required shows that they should be obligated to do their share in return for their benefit. Beneficiaries are not motivated to do their share, but they are to be required to do it. The principle of fairness that activates the fairness obligation with an act of benefiting is not a theory of motivation but a theory of obligation, an obligation to be fulfilled by beneficiaries who benefit from a cooperative scheme of others.

4.5. CONCLUSION

This chapter elaborated the nature of a natural duty in terms of fairness as reciprocity, which has priority over the right of cooperators and equality between cooperators and beneficiaries in justifying the fairness obligation. In sum, to reciprocate is unilateral and non-relational in the sense that it is for beneficiaries to benefit and also for beneficiaries to bear a burden in return. Fairness as reciprocity appeals to neither impartiality nor mutual advantage, but to one's own share, which eventually brings about fair advantage to beneficiaries and cooperators alike. One's own share has to be a fair share, which is to bear a burden in return for a benefit in accordance with the rules of the scheme, with which cooperators have complied, which should be applied equally to all beneficiaries, which take into consideration the different capacities of beneficiaries for doing their share and various scopes of benefits, and finally which help beneficiaries do their share better than when they consult their own judgement. The natural duty to do one's share that is normatively based on fairness as reciprocity is practically activated by an act of benefiting by beneficiaries and becomes a special obligation. The fairness obligation is normatively based on fairness as reciprocity and practically triggered by an act of benefiting.

We should endorse fairness as reciprocity because it matches our conviction that free-riding is non-derivatively and non-instrumentally wrong per se. Thus, beneficiaries of a cooperative scheme of cooperators have an obligation to follow the rules of the scheme primarily because it is right to do so and they come to be in such a position by their act of benefiting, and additionally because by doing so can they avoid infringing the right of cooperators and inequality

between them and cooperators.

Having established its moral foundation, the principle of fairness is now in the position to present itself in a proper and complete shape. It is also ready to meet the objections levelled against it.

5. THE REVISED PRINCIPLE OF FAIRNESS

Individuals who benefit from
a sufficiently just and legitimate scheme of cooperation set up/maintained by
others (cooperators) who do their share by complying with the scheme's rules
for the production of the non-excludable goods in question
have an obligation to do their fair share in return for their benefit
according to the rules of the scheme.
(The revised principle of fairness)

5.0. INTRODUCTION

The last three chapters discussed the moral foundations of the principle of fairness in detail. The right of cooperators and equality between cooperators and beneficiaries, it has been argued, play a role in morally grounding the fairness obligation but are dependent upon a natural duty to do one's share in return for one's benefit, which is morally based on fairness as reciprocity. The study so far has laid down the moral foundation of the principle of fairness; it is fair for beneficiaries to reciprocate their benefit received from a cooperative scheme of others (cooperators), which (reciprocation) consequently accomplishes the right of the latter and achieves equality between the parties. In other words, the following question has been dealt with in previous chapters: why are beneficiaries in certain circumstances required to do their share?

The question to be examined in this chapter is: under which

circumstances do beneficiaries come under the fairness obligation? The more specific questions I address are in terms of the main elements of the principle: ‘beneficiaries’, ‘cooperators’, ‘the goods in question’, and ‘a cooperative scheme’.

This chapter runs as follows. In Section 5.1, the moral foundations of the principle are recapitulated in the form of summary of the last three chapters. In the following four sections, a detailed explanation is given of the circumstances in which the principle should be in operation as its basic idea requires. Section 5.2 introduces the main agent of the principle of fairness, ‘beneficiaries’ while Section 5.3 explains the role of ‘cooperators’. Section 5.4 examines ‘the goods in question’ in detail. Section 5.5 clarifies what is required of ‘a cooperative scheme’ for the principle of fairness to come into effect. Having explored all relevant aspects of the principle, which have not been comprehensively explicated in detail in the original statement by Hart, the explanation by Rawls, or other statements of the principle, I will state, in Section 5.6, the revised principle of fairness with a summary of the circumstances under which the principle operates. At the end of the chapter, the principle of fairness will be ready to meet the three main objections levelled against it.

5.1. THE PRINCIPLE OF FAIRNESS, ITS MORAL FOUNDATIONS

Because it is unfair and thus morally unacceptable to free-ride, we are required to

reciprocate our benefit received from an effort of others. In addition, if we are in a position to reciprocate, that is, if we benefit, then we should reciprocate. Beneficiaries are to come under the fairness obligation to do their share in return for their benefit because it is fair and right for them to reciprocate when and because they benefit.

The review of the debate on the principle of fairness in chapter 1 has picked up the basic ideas of the principle: ‘mutuality of restrictions’ and ‘no free-riding’. According to ‘mutuality of restrictions’, the liberty of both cooperators and beneficiaries should be mutually restricted so that the right of cooperators not to be illegitimately disadvantaged is not infringed and that equality between them is achieved. The idea of ‘no free-riding’ is included in the concept of fairness as reciprocity. As I have discussed the basic ideas in detail in the previous chapters, I just recapitulate them in the following.

First, according to one understanding of ‘mutuality of restrictions’, the fair right thesis, cooperators have a right not to be disadvantaged by the non-compliance of beneficiaries, so the latter should come under the fairness obligation to comply with relevant rules. However, even though there is a sense in which cooperators are disadvantaged by the non-compliance of beneficiaries, the disadvantage does not automatically lead to the right of cooperators to the compliance of beneficiaries; it needs to draw a distinction between legitimate and illegitimate disadvantage, that is, it is because cooperators are disadvantaged by the illegitimate non-compliance of beneficiaries that the former obtain the right to the compliance of the latter. In addition, the right of cooperators to the compliance can bring about an obligation for beneficiaries to comply with

relevant rules if and only if cooperators have an injunction right to the compliance of beneficiaries while beneficiaries do not have an injunction right to their non-compliance. This is possible when the fair right thesis subscribes to the idea that it is right for cooperators to have the right to the compliance of beneficiaries while it is not right for beneficiaries to have the right to their non-compliance, which implies that beneficiaries have a natural duty to do their share in return for their benefit.

Second, the fair equality thesis holds that equal compliance between cooperators and beneficiaries requires the latter to comply with the fairness obligation. According to the fair equality thesis, both cooperators and beneficiaries should equally comply with the fairness obligation for the sake of equality between them. The fair equality thesis works better with comparative egalitarianism, which claims that beneficiaries should do their share because cooperators do their share. However, ironically, the compliance of beneficiaries causes inequality between them and free-riders who do not do their share. That is, equality between cooperators and (complying) beneficiaries triggers inequality between (complying) beneficiaries and free-riders. In addition, beneficiaries' doing their share can be comprehensively justified when cooperators' doing their share is justified, not in a comparative egalitarian sense but in a deontological sense. The inequality problem can be ignored and the comprehensive justification can be achieved by the following idea; beneficiaries have a natural duty to do their share no matter whether there are free-riders and irrespective of whether or not cooperators do their share.

An implication of these arguments is that the duty for beneficiaries to do

their own share has priority over the right of cooperators and equal compliance between cooperators and beneficiaries. Both the right and the equality theses have to presuppose a duty to do one's own share to support their own arguments. If beneficiaries do not have a duty to do their share, i.e., they have a right not to do their share, the right of cooperators cannot by itself impose the fairness obligation on beneficiaries. Also, if beneficiaries are not morally required to do their share, the compliance of beneficiaries with relevant rules would cause inequality between beneficiaries and free-riders even though their compliance achieves equality between them and cooperators. Therefore, beneficiaries must have a natural duty to do their fair share irrespective of whether cooperators have the right to the compliance of beneficiaries or whether equality is to be accomplished between cooperators and beneficiaries.

The natural duty for beneficiaries to do their share is a fundamental moral duty, and is, therefore, not justified by reference to any further value or ideal. The thesis so far has tried to show that the natural duty has to be presupposed when the fairness obligation is to be justified by both the fair right thesis and the fair equality thesis. The duty not to free-ride is also one that is affirmed in common sense morality. This natural duty to do one's share is underpinned by the concept of reciprocity.

The natural duty of reciprocity is to be distinguished from the natural duty of justice by Rawls. Rawls explains the natural duty of justice as follows.

From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us... Thus if the basic structure of

society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme (Rawls 1971: 115).

This duty of justice is natural, according to Rawls, because it ‘holds between all as equal moral persons and is owed to persons generally’ (ibid, 115). Everyone is bound to the natural duty to comply with just institutions because the institutions are just or reasonably just. The critical point of the natural duty of justice is that it has to make a reference to institutions that must be (reasonably) just.

The duty of reciprocity is also a natural duty in the sense that everyone is duty bound to reciprocate when she benefits from a cooperative scheme of others. However, while the natural duty of justice is an institutional duty, the natural duty of reciprocity is an individual duty that does not necessarily have to refer to institutions. It is because institutions are just that everyone has a natural duty of justice to support and obey them. In contrast, beneficiaries are naturally required to reciprocate what they benefit because it is right to do so in itself.

The natural duty of reciprocity as a moral basis of the fairness obligation comprises two ideas of doing a share, one’s own share and one’s fair share. First, it is unfair to free-ride and fair to reciprocate. To reciprocate is an act for beneficiaries as it is for them to benefit and also for them to make a return for their benefit. The same agent benefits and bears burden in return. In comparison with ‘complementarity’ which implies that one’s benefit is the other’s burden (Gouldner 1960, 169), reciprocity means that one should do one’s share of burden in return for one’s own benefit. As a consequence, beneficiaries have a natural duty of reciprocity to do their own share regardless of whether other

beneficiaries do theirs. I have suggested, thus, fairness as reciprocity as a moral foundation of the natural duty to do one's share.

In addition to doing one's own share, it is fair to do one's share in accordance with the rules of a cooperative scheme from which one benefits. There are at least four reasons. First, beneficiaries benefit from the compliance of cooperators with the rules of a cooperative scheme. Second, all beneficiaries should be treated consistently by the rules of the scheme. Third, the rules take into consideration the different capacities of beneficiaries to do their share and the various scopes of benefits received by beneficiaries. Fourth, beneficiaries can do their share better when following the rules rather than their own judgements.

The argument so far suggests that there is a natural duty for one to reciprocate, that is, to do one's own fair share in return for one's benefit according to relevant rules. The fairness obligation is normatively grounded on this natural duty. However, what triggers the fairness obligation is an act of benefiting. When people benefit from the effort of others, they enter into the position to do their share, which is required by the natural duty to do one's share on the basis of fairness as reciprocity. An act of benefiting does not generate but activate the fairness obligation; otherwise the natural duty to reciprocate remains latent.³²

Having established the moral foundation of the principle of fairness, we are in a position to explore under which conditions the principle of fairness operates in terms of 'beneficiaries', 'cooperators', 'the goods in question', and 'a

³² For a fuller discussion about the role of the natural duty in generating the fairness obligation, see Section 4.4.

cooperative scheme', which are discussed respectively in the following sections.

5.2. BENEFICIARIES

'Beneficiaries' in a broad sense means those who benefit from a cooperative scheme and thus includes cooperators and free-riders as well as beneficiaries who are to be either cooperators or free-riders. However, 'beneficiaries' in the principle of fairness signifies those who benefit but are yet to be cooperators or free-riders depending on whether or not they comply with the principle of fairness. Beneficiaries are in the position to choose whether to comply with the relevant rules in return for their benefit or to free ride by not complying with those rules. Beneficiaries are those who benefit and are yet to do their share.

By 'to benefit' I mean the beneficiaries' advantage becomes greater than if the cooperative scheme did not exist. When beneficiaries benefit from the compliance of people for national defence, for instance, they are safe and free from the attack of other countries while they are vulnerable to the attack when there is no scheme of national defence. The increase of the advantage of beneficiaries implies that they benefit without making their own effort. Thus, beneficiaries are yet to comply with relevant rules in return for their benefit.

It should be noted that whether beneficiaries know that they are benefiting from the compliance of cooperators is not relevant to the principle of fairness. An act of benefiting is not dependent upon recognition of the fact of benefit, but the fact itself. For example, some people may not know that they are

safe and free from attack. However, they are still benefiting from the cooperators' compliance for national defence. It is the objective fact that beneficiaries are benefiting from the compliance, not their subjective recognition of the fact, which is morally relevant to the principle of fairness. Beneficiaries' non-recognition of the fact that they are benefiting may be an excuse for their failure to follow the principle of fairness, but cannot justify the claim that they are free to benefit without doing their share.

The irrelevance of beneficiaries' knowledge about their getting a benefit implies that they do not have to consent to the scheme of cooperation from which they benefit. The relevance of beneficiaries' consent to the scheme and their intention to benefit will be examined in detail when the main objections to the principle of fairness are discussed in the following chapter.

There is another condition with regard to beneficiaries in the principle of fairness, i.e., beneficiaries' being participants in a cooperative scheme. Do beneficiaries have to be participants in a scheme of cooperation, in order to be bound to the fairness obligation? Before trying to answer this question, it is necessary to define what it means for beneficiaries to be participants in a cooperative scheme. Beneficiaries can be participants in the sense that (i) they have consented to the scheme, (ii) they can actually benefit from the scheme of cooperation, or (iii) they live in a society where the rules of the scheme are legally binding. The first raises the consent argument against the principle of fairness, which is discussed in the following chapter. The second is obviously required. The third is discussed here.

If individuals benefit from a cooperative scheme the rules of which do

not reach them legally, are they outside the applicability of the principle of fairness? The principle of fairness should apply to those who benefit from a cooperative scheme even though the rules of the scheme do not legally bind the beneficiaries. Because the principle of fairness is a theory of moral obligation, its applicability is not confined within the legal boundary of the rules of a cooperative scheme. Normally, international law legally binds the parties who have consented to the law. However, the principle of fairness requires that a state which benefits from a cooperative scheme of other states is under an obligation to do its share in the scheme, other conditions being met. Thus, beneficiaries do not have to be participants in a cooperative scheme in the sense that they live in a society where the rules of the scheme are legally binding.³³

In sum, beneficiaries are those who benefit from a cooperative scheme of others, either knowing or not knowing that they benefit, and without having done their share. It does not matter whether beneficiaries are participants in a society where the rules of the cooperative scheme are legally binding.

5.3. COOPERATORS

Cooperators must be beneficiaries in a broad sense, but are more characteristically understood as those who have complied with relevant rules,

³³ There is another condition about beneficiaries in the principle of fairness, i.e., voluntary acceptance of the goods in question. This condition will be fully discussed when the principle meets the limiting argument in the following chapter.

maybe willingly but perhaps reluctantly, in return for their benefit. Cooperators are neither altruists who want to provide beneficiaries with the goods free of charge or who consent to beneficiaries' benefiting without doing a fair share nor egoists who benefit from the effort of others without doing their share, but moral agents who comply with relevant rules in return for their benefit.

There are three points to be noted with regard to cooperators in the principle of fairness. First, it was suggested that the liberty of cooperators having been restricted, the liberty of beneficiaries should be restricted as well. 'The restriction of the liberty of cooperators' has been suggested as a necessary condition for the principle of fairness. Its proponents hold that cooperators have the right to the restriction of the liberty of beneficiaries because the former have restricted their liberty for the cooperative scheme from which the latter benefit (Hart 1955: 185). For this reason, Hart argues that beneficiaries should restrict their liberty by following the rules that cooperators have followed.

This condition about the restriction of the liberty of cooperators is not necessary for the principle of fairness in the sense that the fairness obligation is not necessarily the counterpart of the restriction of the liberty of cooperators. The restriction of the liberty of cooperators can be a condition for imposing the fairness obligation on beneficiaries. Equality between cooperators and beneficiaries in terms of the restriction of their liberty is a good reason for the requirement that beneficiaries should restrict their liberty too. However, the restriction is not necessary because there is an independent reason for which beneficiaries should restrict their liberty by following the rules of the scheme from which they benefit, that is, a natural duty to do one's share in return for

one's benefit. Thus, cooperators do not have to have restricted their liberty in order that the liberty of beneficiaries is also restricted.

Second, it is not enough for cooperators to do only their share but they should *comply with relevant rules* with a sense of obligation. If cooperators have done their share not according to the rules but according to their own judgement, a cooperative scheme might not have been established or maintained for the production of the goods in question. In addition, only when cooperators comply with relevant rules, can all cooperators be treated fairly - in the sense that they are treated by the same rules and that they are required to make a contribution, by the rules, in proportion to their capacity and the amount of the benefits enjoyed by them.

Third, cooperators do not need to have intended to provide beneficiaries with the goods in question. Let me examine first a counterargument. Casal holds that the absence of the intention of cooperators to produce the goods in question makes the principle of fairness invalid. Supposing that children are a public good, she argues that 'procreative subsidies cannot be justified by appeal to the principle of fairness, where the relevant public goods are *unintentionally* and costlessly produced' (Casal 1999: 373, my italic). Even though we benefit from the next generation which is composed of children, according to her argument, we do not have a duty to subsidize their parents because they do not intend to produce the next generation by procreation and also it is not *costly* for them to rear their children (ibid. 367), in the sense that parents just enjoy looking after their children and only perform their parental duty to care for them, as a result of which the children become a social good later on. This argument is based on the

intuition that ‘we do not usually think that we are under an obligation, let alone an enforceable one, to reward people for a benefit they produced *unintentionally*, when doing something they love doing’ (ibid. 367, italic added). Casal thinks that it is not required to recompense those who already enjoy doing something for their enjoyment.

In order to point out a misleading point of this intuition, Boran suggests a distinction between ‘distributive benefits’ and ‘personal reward’ (Boran 2006: 107). ‘Distributive benefits’ can be figured out in terms of cost and benefit while ‘personal reward’ cannot be gauged in relation to one’s effort (ibid 107-112). For example, parents who love looking after their children are rewarded with such joy; however, the fact that they have their own personal reward for their rearing their children does not mean that they are not entitled to child benefit for their children. Boran’s main point is that those who do something for the provision of a public good are entitled to ‘distributive benefits’ no matter whether they receive ‘personal reward’ in a form of say personal satisfaction or enjoyment. ‘Distributive benefits’ can be legitimately awarded *on top of* ‘personal reward’ because what distributive justice is concerned with is not personal choice that may result in good or bad luck, but the distribution of burden and benefit. Therefore, even though parents may enjoy rearing their children, neither intending to make them a public good nor bearing any cost to do so, they are still entitled to ‘distributive benefits’, i.e., procreative subsidy, as long as their children become a public good.

I think the relevant question here needs to be raised from a somewhat different point of view. Rather than asking if parents are entitled to receive

distributive benefits, the principle of fairness asks if non-parents have an obligation to support parents in return for their benefit, the future public good, especially when parents have no intention to produce their children as a social good.

Whether parents (cooperators) have the intention to provide others with their children as a public good is not relevant for the principle of fairness. Even though cooperators do not intend to provide beneficiaries with a cooperative good or do not expect anything from beneficiaries, the latter still have an obligation to do their share *if other conditions are met*. For example, TV licence payers do not pay the licence fee *in order to* provide others with the service, but just pay in return for their own viewing. Even though the payers do not intend to produce the service for others, other TV watchers are supposed to pay the fee in return for their own viewing.

What makes a difference to the principle of fairness is whether there is a cooperative scheme and fair rules for the provision of the goods in question. With regard to procreative subsidy, it makes a difference whether beneficiaries benefit from parents' natural procreation or from population policy. For example, if non-parents benefit from natural procreation, they do not have an obligation to do their share in return because there is no scheme of cooperation which is set up for the provision of the good and in which parents comply with relevant rules. If beneficiaries benefit from population policy that is adopted for the provision of the future public good, they do have an obligation to make a contribution to the policy because there is a cooperative scheme for the provision of the good and some relevant rules that govern the provision of the good.

In practice, however, parents cannot be required but only encouraged to have children and thus they do not have to conform to population policy or other relevant rules concerning the procreation. It is not the case that non-parents benefit from the compliance of parents with population policy. Thus, there is no obligation for non-parents to do their share because there is no scheme of cooperation that is governed by a set of rules concerning the provision of the good. The reason is not that parents have no intention to provide the social good.

On the other hand, there is a cooperative scheme for developing citizenship of children. Once children reach a certain age, their parents have a duty to provide them with a fundamental education. As a result of the compliance of parents with the rules about fundamental education, children become citizens, a social good. In this case, non-parents who benefit from this social good have an obligation to make a contribution to the scheme of fundamental education because the good has been provided by the compliance of parents with relevant rules.

In sum, cooperators are not volunteers or altruists who intend to provide others with the goods in question for nothing, but moral agents who do their share by complying with the rules of the scheme from which they benefit. While they must have restricted their liberty in complying with relevant rules, they do not have to have intended to do so in order that beneficiaries should also restrict their liberty because beneficiaries have an independent natural duty to do their share. In addition, it is not necessary that cooperators have an intention to provide the goods in question. With regard to the question of when beneficiaries have an obligation to do their share, what is relevant is not whether cooperators

have such intention, but whether there is a cooperative scheme in which cooperators comply with the rules of the scheme.

5.4. THE GOODS IN QUESTION

The goods in the principle of fairness have three kinds of characteristics: one that they should have, one that they can have, one that they should not have.

First, the goods in question should be produced (1) by a cooperative effort of people (2) with a sense of obligation to do their share in return for their benefit, and (3) which are non-excludable in either one of two senses.

(1) The goods are produced by a cooperative scheme in which cooperators do their share. It is only when the goods in question are produced by a collective effort of people that the principle of fairness can be in operation. When the goods are produced by a cooperative effort of cooperators, it is necessary, as it has been so argued, that cooperators comply with the rules.

(2) When people produce the goods in question by a cooperative effort, they do so with a sense of obligation to do their share in return for their own benefit. If they do their share without a sense of obligation but only for their own pleasure or satisfaction, then such goods do not fall within the scope of the principle of fairness. For example, a beautiful street swept and tended by my neighbours is not one of the goods in question even though it is produced by a combined effort of people because there is no cooperative scheme that is set up for the provision of the beautiful street which has a set of rules that they follow

with a sense of obligation in return for benefit; they sweep and tend merely for their own satisfaction.

(3) The goods in question must be non-excludable in either one of two senses. Once they are provided to someone in a society, they are available to anyone else in the same society, sometimes even to someone from outside the society. This might be because it is either technically impossible or too costly to select beneficiaries. In addition, the goods in question must be non-excludable in the sense that the provision of the goods is such that people can benefit without doing their share. Because it is possible for beneficiaries to enjoy the goods without any restrictions, the goods are vulnerable to free-riding. If the goods are excludable, i.e., if it is possible and reasonably cheap to select beneficiaries, then any free-riding that happens can be easily avoided by preventing individuals from benefiting from the goods. In such circumstances, the principle of fairness is possibly redundant because there are ways of ensuring that individuals do their fair share without asserting an obligation to comply with the principle of fairness. However, once national security is set up in a country, anyone in the country can benefit from the good without doing their share, in which case the principle of fairness comes into effect.

Second, the goods in question can have at least four features. (1) The benefits in question include 'pure public goods' (Arneson 1982: 618-9) which are indispensable for a decent life. To quote from Arneson (*ibid.* 618), 'all members of the group must consume the same quantity of them'. Thus, no matter whether one dislikes 'pure public goods' according to individual preference, the goods are provided to all members of the group, who have to do their share in

return. However, the goods in question do not have to be always ‘pure public goods’; some goods like TV service are not ‘purely public’, but still cause the problem of free-riding because they are made available through the compliance of cooperators and are supplied to beneficiaries without technical access control.

(2) The goods in question do not always have to be indispensable, either; beneficiaries of dispensable goods still have the fairness obligation, other conditions met. Even those who suggest the indispensability of benefit would not say that beneficiaries do not have an obligation to do their share in return for dispensable goods that have been voluntarily accepted. The reason why they suggest the indispensability of a benefit is that beneficiaries should not be forced to benefit from the provision of the goods in question, and that there is no problem of enforcement of indispensable goods because no one can be forced to have goods indispensable for her life. However, the goods in question do not have to be indispensable in order for beneficiaries to come under the fairness obligation. If beneficiaries voluntarily accept dispensable goods, it does not make sense that they are forced to use dispensable goods. The principle of fairness applies in the provision of not only indispensable goods but also dispensable goods.³⁴

(3) The goods that the principle of fairness is concerned with do not have to be non-rival in their consumption. However, their non-rivalness

³⁴ ‘The indispensability condition’ is suggested so as to overcome the limiting argument that holds that only beneficiaries who voluntarily accept the goods in question are under the fairness obligation. If the limiting argument is rebutted, then the indispensability condition does not have to be satisfied. The following chapter deals with the limiting argument.

necessarily calls for the principle for it deepens the problem of free-riding. If a good is only non-excludable and rival, i.e., a good does run out as more people use it, it is obvious that free-riders are illegitimately making the good less available to cooperators, on the basis of which the former can be required to do their share without employing the principle of fairness.

For example, fresh air that is provided by an effort of a group of people who comply with certain rules is non-excludable in its provision but rival in its consumption. If only a half population join the effort for the fresh air while the other half just enjoy it without doing their share, then the fresh air will be less available for both cooperators and free-riders. Up to the point where there is sufficient air for all, there has not been recognition of the need of the cooperative acts. However, when it is revealed that there is no more fresh air for all the population for the present and the future, i.e., the good in question becomes less available than it should be, we can appeal to the right of cooperators as a strong reason for beneficiaries to do their share without reference to the principle of fairness. Cooperators have a right to fresh air, the product of their effort, while free-riders do not - although the latter have the human right to breathe fresh air. It is a breach of the right of cooperators for free-riders to use the product of the former.

However, if the goods in question are non-rival as well as non-excludable, the principle of fairness is of crucial importance. A TV service is one of the most vivid examples of the principle of fairness. The free view channels in the UK are currently not encoded and thus 'free' provided people have a TV. Those who watch without a licence are liable to a fine, which, however, does not

technically prevent them from watching without paying. The TV signal in the air does not run out as more people watch. In this case, with regard to the obligation for beneficiaries to do their share, we can appeal to the principle of fairness that is based on fairness as reciprocity, prior to the right of cooperators. Therefore, in case where the goods in question are non-rival as well as non-excludable, it is necessary for the principle of fairness to come into play to require beneficiaries to do their share.

4) The goods in question may be produced *indirectly* by a cooperative scheme of cooperators. A cooperative scheme may produce a good which is an externality of another good. A scheme may be set up for the production of a good as a result of which another kind of good can be produced without additional cost. When beneficiaries benefit from a good *indirectly* produced by a cooperative scheme for which cooperators comply with the scheme's rules, they have the fairness obligation, other conditions being satisfied. For example, when a cooperative scheme is established for the production of a TV service in a country, the TV service brings about a broadcasting network on which those who appear on TV can win national (and possibly international) popularity and earn a considerable amount of income. The national popularity and the popularity-owing income are dependent upon the original effort to produce TV service as well as the excellence or effort of those who win them. The popularity and the popularity-owing income are ultimately impossible without a TV service provided and maintained by the compliance of cooperators. Thus, those who enjoy the indirect good, i.e., the popularity-owing income, have an obligation to do their share in return for their benefit - at least to the extent that it is dependent

upon the original effort of others.

Finally, the goods in question are not provided in the form of (1) gift or donation that is freely and intentionally given *by favour*, (2) a lottery win that is won *by chance*, or (3) windfall or manna from heaven that is anonymously bestowed *by nature* through no effort of anyone.

(1) Gifts or donations are not among the goods in question of the principle of fairness because they are intentionally given *by favour* of the givers. National popularity might be regarded as one of the goods in question at least to the extent that it is ultimately made available indirectly by the original effort to set up TV service. However, it is because the popularity-bearers are favoured by their fans that they obtain their popularity. It does not sound right to say that the stars do not deserve their popularity just because it is impossible without the original effort of others.

Similarly, it is up to beneficiaries how many hours a day or a week they watch TV or how much they like particular programmes once the service is provided. Some watchers may enjoy some TV programmes much more than others do. The greater amusement enjoyed by some watchers is dependent upon the preference of beneficiaries even though it is made available ultimately by the original effort of cooperators. Thus, there is no extra obligation for the lucky beneficiaries who may enjoy greater amusement. However, they still owe the direct provision of the TV service to cooperators who join the effort for the provision of the original good with the sense of obligation to do their share.

As I argued earlier, the popularity-owing income is not beyond the reach of the principle of fairness. People do not just give their money to pop stars; they

pay for what they like about the stars. They purchase popular music and tickets, as a result of which the stars earn more than they deserve from their excellence or effort alone. The stars deserve the popularity given by favour, but not the whole popularity-owing income at least a part of which is made available neither by favour nor by their excellence or effort but by the cooperators who maintain the TV service.

(2) While a lottery ticket is a commercial good that can be purchased at its price, a lottery win can be obtained only *by chance*. The process by which a chance to win a lottery turns into a lottery win is outside human control. Thus, I believe that the good of a lottery win is outside the scope of the principle of fairness because a lottery win is out of human control.³⁵

However, we need to be careful to distinguish between a lottery win and the lottery prize money. We may say that a lottery winner deserves to win the lottery when the winner is lucky - unless the lottery is manipulated in favour of the winner. However, it does not automatically follow that the winner deserves to win all the prize money because the prize money is made available by the effort of those who have taken part in the scheme of the lottery. The lottery prize money is a good indirectly produced by a collective effort of people who buy their tickets with a sense of obligation to pay for. Thus, a lottery win itself is not, and the lottery prize money is, one of the goods in question of the principle of fairness because the former is produced by chance while the latter by a

³⁵ The TV service is also provided by the lucky fact that it is not possible to choose beneficiaries, and thus it may be argued that the lucky beneficiaries should not be required to do a share in return for benefit received by luck. However, it is not made available by chance beyond human control.

cooperative effort with a sense of obligation. Thus, when the lottery winner receives the prize money, the principle of fairness requires that the winner return a part of the prize money to the lottery scheme, which is indirectly made available by the effort of lottery participants, and allows the winner to keep the other part of the prize money which is won by chance.

(3) Suppose a country sets up a rule for its national park just inside its border to a neighbouring country, which is lucky to breathe the fresh air blowing from the national park. The fresh air that people in the neighbouring country breathe is a windfall that is arbitrarily given *by nature* (the wind) although the fresh air itself is produced by the effort of the first country. The provision of the fresh air for lucky beneficiaries is not directly dependent upon the effort of cooperators but upon the wind that does not belong to anybody. The neighbouring country breathes the fresh air that blows, by natural chance, from the national park of the first country. Even though the national park has been built and maintained by the cooperative effort of the people in the first country, the fresh air blowing from the park is a good fortune for the neighbouring country given by nature.

In this light, Carr says that

during the cold war Canadians undoubtedly received a degree of security because they stood under the United States umbrella of nuclear deterrence. But we could hardly insist that Canadians should assume a portion of the cost of the American defense budget for these years (Carr 2000: 36).

According to him, Canadians are ‘not free-riding’ and ‘just lucky’ (ibid, 37), and I agree. The Canadians are lucky to reside geographically next to the USA that they can benefit from the nuclear umbrella received by nature.

It may be pointed out that the argument so far implies that the principle of fairness should not require the US citizens to do their share in tackling global climate change because they are lucky to live in a global society that makes a global effort to tackle climate change. That is, US citizens are lucky to benefit from the nature that spreads clean air all over the globe just as Canadians were lucky to benefit from geography. However, the principle of fairness refers to the fact that they benefit from the global effort to tackle climate change in the sense that will be developed in detail in chapter 7.

In sum, the goods in the principle of fairness (1) are provided by a cooperative scheme of those who have a sense of obligation to do their share in return for their benefit, and are non-excludable in the sense either that they are available to anyone in the scheme or that beneficiaries can enjoy them without any access restrictions, (2) have some unnecessary but sufficient characteristics such as pure publicity, indispensability, non-rivalry, and indirect production, and (3) are not supplied by favour, by chance, or by nature.

5.5. A SCHEME OF COOPERATION

There should be a cooperative scheme in the principle of fairness in the sense that beneficiaries benefit from a cooperative scheme and the goods in question

are produced purposely by the scheme of cooperators who comply with the scheme's rules. Beneficiaries benefit from a cooperative scheme that is established for the purpose of providing the goods in question and is maintained by the compliance of cooperators with its rules. For example, beneficiaries do not benefit from fireworks set off by a number of different people for their own amusement, because there is no cooperative scheme established to produce the show of fireworks. For the principle of fairness, there should be a cooperative scheme established and maintained by cooperators who comply with its rules in order to provide the goods at issue.

The rules of a cooperative scheme do not have to be formally written down to be morally binding. As long as the rules are just and fair, and reasonable individuals find them reasonable enough to follow, the rules can be *tacit* in the sense that they are implicitly agreed among those who follow them. For example, suppose people join a campaign for a litter-free street by not dropping litter on the street and put it in litter bins provided. They do not join the campaign just for their own pleasure but for the sake of public pleasure. There is no formal rule that imposes a fine on someone who is caught dropping litter on the street, but still people make an effort to find bins for their litter in order to have a clean public street. In this case, those who benefit from this clean street have a moral obligation not to drop litter even though there is no formal rule that compels them. People comply with *tacit* rules for a public benefit, which are sufficient for the imposition of the fairness obligation on their beneficiaries.

A cooperative scheme governed by rules is supposed to be just and legitimate. As Rawls suggests in his version of the principle of fairness (1971:

343), the justice of a cooperative scheme condition needs to be met. This condition can be discussed by asking three questions.

- (1) What does it mean for a cooperative scheme to be just and legitimate?
- (2) Does the scheme have to be completely just?
- (3) Is the scheme to be just to members of other schemes?

(1) A cooperative scheme that runs on the basis of its rules should be just in the sense that beneficiaries should be equally treated, other things being similar, and differentially treated, other things being different, in being obligated to reciprocate. The fairness obligation is inapplicable if some beneficiaries are obligated while others are not, without differential reasons. A scheme of cooperation should show no favouritism.

There may be some free-riders. However, their presence does not affect the impartiality of a cooperative scheme. Some beneficiaries free-ride intentionally or accidentally despite the requirement; this cannot be a reason for other beneficiaries not to be obligated once all beneficiaries have been required to do their fair share whether or not they actually comply with the requirement. A scheme of cooperation should be just in the sense that it is free from favouritism in requiring beneficiaries to do their share no matter whether beneficiaries actually follow the principle of fairness. Whether or not they abide by the principle is up to beneficiaries, not the cooperative scheme.

The justice condition of a cooperative scheme is necessary because significant injustice of a scheme will cancel the fairness obligation. If some beneficiaries are required to do their share to the extent of say 100 while other

beneficiaries to the amount of 50, by the same cooperative scheme in a similar circumstance, the unfair requirement of doing more share than others' cannot be justified. Beneficiaries do not have an obligation to follow the rules of a cooperative scheme that are significantly unjust.

Furthermore, in the same light, there is no obligation to obey an immoral cooperative scheme. The concern about the immorality of a cooperative scheme is that there is reasonable disagreement over what counts as immoral. Although Christians believe that certain kinds of expression are blasphemous, atheists deny this. Because principle of fairness is a principle designed to generate obligations for free and equal persons who disagree about such matters, the principle of fairness does not take a stand on these disputes. However, there are certain kinds of immorality that are agreed to be such by free and equal persons. That's what makes them immoral, at least on one interpretation of that concept. A cooperative scheme has to be moral in this sense at least.

While a cooperative scheme should be just to all cooperators and (prospective) beneficiaries, the scheme should be *legitimate* in the sense that the scheme should result from democratic consultation and be agreed upon by a majority of cooperators and (prospective) beneficiaries. A considerable number of the (potential) beneficiaries of the goods should have been consulted with regard to establishing the scheme that produces the goods. It may well not be unanimously agreed that the scheme of cooperation is set up for the provision of certain goods; people may disagree with the method of their production or provision, or the provision of the goods itself. However, the scheme should be chosen through a democratic process in the sense that those who are affected by

the scheme are consulted and thus know the rules, and a majority of them agree on the rules.

As a matter of fact, a cooperative scheme is democratically chosen only when there are different conceptions of the goods in question. A unanimous agreement on the provision of the goods in question cannot characterise the process of the provision as democratic. The variety of the conceptions of the goods in question is supported by Rawls who says that

the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy (Rawls 1993: 36).

For this very reason, Rawls goes on to say that ‘an enduring and secure democratic regime, one not divided into contending doctrinal confessions and hostile social classes, must be willingly and freely supported by at least a substantial majority of its politically active citizens’ (ibid. 38). In this light, a cooperative scheme should be set up and maintained by the compliance of a considerable number of cooperators even though not every member of the affected group supports the scheme.

It is necessary that a cooperative scheme is legitimate in the sense explained above. The fairness obligation is not justified when the benefit in question is simply imposed upon beneficiaries without them being consulted at all. The legitimacy of a cooperative scheme is necessary for the generation of the fairness obligation in the sense that the involvement of beneficiaries in the

process of establishing a cooperative scheme and producing the benefit in question is crucial in obligating beneficiaries to reciprocate the benefit. A beneficial cooperative scheme must provide individuals with the opportunity to influence the goals it pursues if it is to demand their compliance for benefits produced in their name.

(2) The justice of a cooperative scheme condition that requires impartiality in imposing the fairness obligation cannot do *perfect justice* in the process of providing the goods in question. It is obviously unfair for a cooperating body to favour certain ways to supply the goods in question for insufficient reason. But, to take an example, in spending the national security budget, a government may fail, *accidentally or unintentionally*, to be fair in choosing the right supplier in the defence industry. As a result, some suppliers may have been discriminated against and the government may have spent more money than necessary. In this kind of unfairness or wrong, beneficiaries are still under the fairness obligation to do their share *unless* the cooperating scheme is *intentionally or considerably* partial to some beneficiaries. As Rawls points out, institutions should not ‘exceed the limits of tolerable injustice’ (Rawls 1971: 112) or they are to be ‘reasonably just in view of the circumstances’ (ibid. 112); *minor* injustices of cooperation should not cancel the obligation to be imposed on beneficiaries. This is purely because it is not practically feasible for a human cooperative scheme to be perfectly just. In this sense, the view that claims that even minor injustices cancel the fairness obligation is too ideal to be applied to a scheme of cooperation that cannot be flawlessly just.

(3) A scheme of cooperation should be legitimate in the sense that it is

fair and just to its own members *and* members of other schemes as well. Pevnick (2006) argues that cooperation should be fair to non-members as well as its members in order to impose the fairness obligation on its members. According to him,

the existence of obligations cannot be assessed in the absence of an awareness of how the action in question affects (or is likely to affect) outsiders... *obligations of fairness must not hinge on an unfair relationship with outsiders* (Pevnick 2006: 240, his italics).

For example, a rich country employs people from other countries at a very cheap price in order to provide its citizens with national defence. In this case, the citizens of the rich country should not be required to support their government even though they benefit from national defence because it is unfair to the people from other countries. In other words, if the scheme of cooperation from which one benefits exploits the other scheme of cooperation in providing its members with the goods in question, one should not join such an unfair scheme of cooperation, unfair to the members of the different scheme, even though one benefits from it. This is because the compliance of beneficiaries in a country may result in unfairness to the members of other countries.

The way a cooperative scheme provides its members with the goods may be unfair to members of other schemes. However, the unfairness to them should not ‘exceed the limits of tolerable injustice in view of *their* circumstances’ (Rawls 1971: 112, my italic). A cooperative scheme should not be too unfair to the members of other schemes in the sense that the initial scheme complies with

the rules of other schemes that are reasonably just to their own members. A cooperative scheme may use the labour of members of other schemes to provide the goods its own members, paying them fewer wages than the minimum for its own members, but still more than the minimum wage for the non-members. If the minimum wage for the non-members does not ‘exceed the limits of tolerable injustice in view of *their* circumstances’ (ibid. 112, my italic), the cooperative scheme paying a reasonable amount of wages is fair to members of other schemes, so its members should do their own share in return for the goods provided in such a way.

It follows from the fact that a cooperative scheme should be reasonably just and fair to non-members as well as members of the scheme that it has a duty to require beneficiaries to do their share. A cooperative scheme has a duty to require beneficiaries to do their share in return for their benefit on account of fairness as reciprocity and it has a duty to require all beneficiaries to do their share according to relevant rules for the sake of equity. This duty of a cooperative scheme naturally entails that beneficiaries come under the fairness obligation. The fairness obligation which is morally based on fairness as reciprocity and is triggered by the beneficiaries’ act of benefiting is enforceable on beneficiaries because the cooperative scheme has a duty to make it sure that beneficiaries come under the obligation.

In sum, in the principle of fairness, there should be a cooperative scheme established for the purpose of providing the goods in question and maintained by the compliance of cooperators with its rules. The cooperative scheme has to be just to all cooperators and (prospective) beneficiaries, and legitimate in the sense

that it is set up through a democratic process and produces the goods in question according to rules which should be fair to non-members of the scheme as well as its members. Because the scheme has a duty to be just and fair by binding beneficiaries to the fairness obligation, this obligation is enforceable on beneficiaries.

5.6. THE REVISED PRINCIPLE OF FAIRNESS

The exploration of the aspects of the principle of fairness requires that the principle be revised so that it represents adequately the conditions under which the principle operates. On the basis of the moral foundations of the principle and relevant conditions explored so far, I revise the principle of fairness as follows.

The Revised Principle of Fairness

Individuals who benefit knowingly or unknowingly from a sufficiently just and legitimate scheme of cooperation set up and/or maintained through democratic procedures by others (cooperators) who do their share by complying with the scheme's rules even without the intention to produce non-excludable goods in question directly or indirectly, have an obligation to do their fair share in return for their benefit according to the rules of the scheme.

In order to see the difference between the revised principle and Hart's original one, let us consider his once again.

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission (Hart 1955: 185).

As it has been shown so far, the revised principle demonstrates that the principle of fairness is a theory of obligation while Hart suggests a theory of right. While the revised principle explains under which conditions beneficiaries obtain the fairness obligation, the original statement illustrates a brief situation in which cooperators acquire the right to a similar submission from beneficiaries.

As a result, what the revised principle of fairness is mainly concerned with are beneficiaries who are yet to be cooperators or free-riders. Hart's statement focuses on the right of cooperators, on the basis of which an obligation is additionally derived to be imposed on beneficiaries. Accordingly, his principle is more concerned with cooperators who are supposed to gain a right to 'a similar submission from those who have benefited by their submission' (Hart 1955: 185). On the contrary, the revised principle of fairness turns to the other agent in question, beneficiaries who are to come under the fairness obligation under certain conditions.

In addition, the revised principle of fairness explains in detail under which circumstances the fairness obligation is generated, in terms of the main aspects of the principle. The circumstances under which the principle of fairness operates are as follows. The fairness obligation to do a fair share applies when:

- **Beneficiaries** benefit from the compliance of others with the rules of a

cooperative scheme that produces the goods in question; *and*

- **Cooperators** do their share by complying with the rules; *and*
- **The goods in question** are produced directly or indirectly by a cooperative scheme of cooperators who abide by its rules, and are public in the sense that they are non-excludable in their provision; *and*
- **A scheme of cooperation** has relevant rules and is reasonably just and legitimate to its members and non-members.

5.7. CONCLUSION

The principle of fairness has been fully established with its basic ideas elaborated, its contents explained, and its conditions satisfied or repudiated. According to the principle of fairness, beneficiaries of the compliance of cooperators with the rules of a cooperative scheme that produces directly or indirectly the goods in question should be obligated to do their share, which is to abide by the rules in return for their benefit. The principle of fairness looks desirable as a theory of obligation for it is undoubtedly fair to do a fair share when the necessary conditions are met.

It is another matter, however, whether the principle of fairness survives objections and applies to practical issues in various circumstances. The three objections levelled against the principle will be dealt with in the following chapter and the principle will be applied to a practical issue, global climate change, in the last chapter. The principle of fairness will be refined as it encounters the main objections and the application to a practical issue.

6. THE PRINCIPLE OF FAIRNESS: ITS CRITICS AND DEFENCE

Some obligations are independent
of my voluntary commitments.
(Dworkin 1988: 42)

Voluntariness or involuntariness is a matter of degree.
(Feinberg 1986: 121)

Such and such activities are inherently immoral.
(Feinberg 1990: 125)

6.0. INTRODUCTION

The last chapter presented the revised principle of fairness, according to which individuals who benefit from a sufficiently just and legitimate scheme of cooperation set up and maintained through democratic procedures by others (cooperators) who do their share by following the scheme's rules even without the intention to produce the non-excludable goods in question directly or indirectly, have an obligation to do their fair share in return for their benefit according to the rules of the scheme.

What if, for example, new immigrants to the UK watch TV without having consented to the licensing law? Do they still have an obligation to follow the law which they have not consented to at all? What if existing citizens reside

in a country without any intention to benefit from the national security, which is set up and maintained by other citizens? Do they have an obligation to comply with conscription when other conditions are met? What if one person's paying the licence fee makes nearly zero contribution to the production of TV while it costs her a fairly considerable amount of money? Should she bear a burden that is almost nothing to the scheme of cooperation but quite something to her? These questions raise objections to the principle of fairness, which are labelled respectively as the consent argument, the limiting argument, and the utility argument.

In this chapter, the principle of fairness is defended against these objections. Section 6.1 argues that Nozick's consent argument fails because it cannot explain certain intuitions we have about our obligations to follow relevant rules and also because it does not take into consideration some important conditions for the principle of fairness. The following Section, 6.2, discusses the limiting argument based on 'voluntary acceptance' of benefits. It is argued that 'mere receipt' of benefits is sufficient with regard to the intention of beneficiaries. Section 6.3 rebuts the utility argument, which is not sensitive to a concept of fairness, to which the principle of fairness shows great sensitivity. The last section 6.4 concludes the chapter by stating the revised principle of fairness once again, with some more explanations.

6.1. THE CONSENT ARGUMENT

Nozick's consent argument is widely held to be a powerful objection to the principle of fairness. According to the consent argument, beneficiaries should not be bound to the fairness obligation without their consent to a cooperative scheme even though they benefit from the scheme. There have been several responses to the consent argument (Bell 1978, Simmons 1979, Arneson 1982, and McDonald 1984). In the following, I shall try to rebut the consent argument. Previous responses are insufficient to reject the argument while my rebuttal succeeds. I begin this section by analysing Nozick's argument against the principle of fairness.

6.1.1. Nozick's consent argument

Nozick's famous example against the principle is worth reading once again.

Suppose some of the people in your neighbourhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? Surely not.... it [the principle of fairness] would not serve to obviate the need for other persons' *consenting* to cooperate and limit their own activities (Nozick 1974: 93, 95, his italic).

In short, no obligation should be imposed upon those who do not consent to the rules of the scheme that produces the goods for them. Nozick is sure to say that even a modified principle of fairness ‘would not serve to obviate the need for other persons’ *consenting* to cooperate and limit their own activities’ (ibid. 95, his *italic*). He mentions the word ‘consent’ once only in the last sentence of his argument against the principle of fairness, but he reveals the idea of consent all the way through his argument.

Nozick stresses the fact that he is not included in the process of setting up the cooperative scheme from which he benefits and thus he is excluded from the arrangement of imposing the fairness obligation. This can be seen in the following phrases and sentences;

- the supposed obligation to cooperate in the joint decisions of *others* to limit *their* activities (ibid. 93, my *italics*);
- can others create an obligation for you to do so *by going ahead* and starting the program *themselves*? (ibid. 94, my *italics*);
- *you may not decide* to give me something, for example a book, and then grab money from me to pay for it’ (ibid. 95, my *italics*);
- you may not charge and collect for benefits you bestow *without prior agreement* (ibid. 95, my *italics*).

Nozick understands the principle of fairness as a theory of obligation that places individuals under obligations that are created by *others*, and tries to protect individuals from such an authoritarian venture by putting ‘consent’ in the way of the fairness obligation.

It is noteworthy that Nozick's consent argument against the principle of fairness is distinguished from, though closely connected to, his argument against the enforceability of obligations of fairness. He says that 'an argument for an enforceable obligation has two stages: the first leads to the existence of the obligation, and the second, to its enforceability' (ibid. 93). Having argued against the enforceability, Nozick makes the consent argument against the principle of fairness by denying the existence of the obligation itself on the basis of the idea of consent. That is, what the consent argument holds is that beneficiaries are not to be obligated to do their share without their consent to the scheme, not that they are not to be *forced* (by cooperators or a cooperative scheme) to come under the fairness obligation.

6.1.2. The fairness obligation: not consent- but duty-based

Before examining the consent argument, I shall draw attention to the idea that the fairness obligation is *not* a voluntary obligation that arises as a result of the will of the parties to the obligation. A voluntary obligation is understood as follows:

The agent is under a voluntary obligation to perform an act only if the reasons because of which the act is obligatory bear not on *the desirability* of performing the act but on *the manner* in which the obligation was incurred (MacCormick & Raz 1972: 97, my italics).

In other words, one comes under a voluntary obligation because one agrees or consents to perform an act, not because the act in question is right to perform.

However, the fairness obligation does not rely on consent-based justification but on fairness as reciprocity, which is the substance of the obligation rather than ‘the manner in which the obligation is incurred’. The consent argument depending on ‘the manner’ cannot present a challenge to the fairness obligation, which is based on a duty to do one’s own share. Beneficiaries are required to do their own share not because they have consented to do it but because there is a duty to make a fair return for one’s benefit and because they benefit from the compliance of cooperators.

According to Dworkin,

the claim that all obligations are self-imposed does not fit the moral facts. That I have obligations of gratitude to my aged parents, of aid to the stranger attacked by thieves, of obedience to the laws of a democratic and just state, of rectification to those treated unjustly by my ancestors or nation are matters that are independent of my voluntary commitments (Dworkin 1988: 42).

Although I do not agree that every obligation listed above arises independently of voluntary commitments, there are some obligations that are not based on the consent of the obligated but on a duty, one of which is the fairness obligation. The principle of fairness requires an obligation that is based on the idea of duty that is available without reference to personal consent based on individual autonomy. The fairness obligation is based on a duty not to free-ride on others’ effort without their permission.

Suppose a group of people take turns to provide one another with a lift

every morning. Everyone who is part of the scheme has an obligation to take their turn. There is a sense in which the obligation to do so arises from their own agreement. Precisely speaking, however, the agreement promises to fulfil their duty to do a share, which already exists. Each member agrees to use her car in return for rides given by others because it is fair and right to do one's share in return for one's benefit. On the face of it, the obligation to do one's share seems to arise from consent, but it is morally based on a natural duty, i.e., fairness as reciprocity.

On the basis of a natural duty to do one's share, the fairness obligation is 'triggered' by one's act of benefiting. I have a natural duty to do my share, which is not in operation until I do benefit. When I benefit from a scheme in certain circumstances, I come under an obligation to do my share in return. This process of being triggered is sometimes unfortunately misinterpreted to mean that the fairness obligation comes from the consent of those who benefit, normally from their tacit consent by the act of benefiting. However, an obligation for those who benefit from the effort of others to do their share does not *originate from* their consent but from a natural duty to do so.

In a similar way, Simmons replies to the consent argument by appealing to a duty not to free-ride. According to him, it is free-riding to benefit from the effort of others without doing one's share even though one does not consent to the scheme of cooperation. Simmons claims that

it seems clear that a man *can* accept benefits from a scheme, and be a participant in that sense, without giving his consent to the scheme. And further, such acceptance of benefits *does* seem to obligate him to do his

part (Simmons 1979: 126, *his italics*).

This claim is supported by his example, in which Jones who strongly opposes the cooperative scheme to dig a well for water supply but goes deliberately to the well and drinks from it is ‘a perfect example of a free-rider’ (ibid. 126-7). Jones’ obligation to do his part in the scheme is ‘not accounted for by a principle of consent’ but ‘in terms of fair play’ (ibid. 127).³⁶

6.1.3. Unnecessary to consent for other reasons

There have been several responses to the consent argument that are similar to the principle of fairness as I have elaborated it, in denying the necessity of consent. However, they give different reasons for rejecting consent as a necessary condition for the fairness obligation. These responses can be divided into two groups. They claim it is not necessary for beneficiaries to consent to a cooperative scheme from which they benefit (1) because they voluntarily accept the goods in question and (2) because the fairness obligation derives directly from the right of cooperators.

Bell (1978) and Simmons (1979) argue that it is not necessary for beneficiaries to consent to a cooperative scheme because they voluntarily accept the goods. The following is from Bell.

³⁶ Simmons’ reply to the consent argument is similar to the principle of fairness in the sense that both appeal to a duty not to free-ride. However, the former presupposes that beneficiaries voluntarily accept the goods in question. In the following section, it is argued that this is not necessary for the principle of fairness.

the passive recipient of the benefits of the public address system was not a party to the transaction, nor did he portray himself as a participant in this venture, and neither Hart nor Rawls would say that he was obligated to take his turn by the principle of fairness... In other words, one “voluntarily accepts” the benefits in this sense when he actually portrays himself as engaging in the social practice. *Portraying oneself as a participant* in a practice is the action which makes the acceptance of benefits voluntary and thus generates the obligation (Bell 1978: 67, 68-9, his italics).

On the basis of the idea that ‘the parties stand in a special *natural* relation to one another’, Bell argues that by ‘voluntarily accepting the benefits, he [beneficiary] is actively engaging in the institution in question’ (ibid. 71, his italic). Thus, they do not need to consent to the scheme.

Pointing out that the distinction between [voluntary] acceptance and mere receipt of benefit is ‘completely overlooked in Nozick’s discussion of the principle of fair play’ (Simmons 1979: 125), Simmons argues that ‘one becomes a participant in the scheme precisely by accepting [voluntarily] the benefits it offers’ (ibid. 125). For Simmons, those who become participants in the scheme by voluntarily accepting the goods from it do not have to consent to the scheme. Because the principle of fairness applies only when the goods are voluntarily accepted, ‘the principle of fair play does not collapse into a principle of consent’ (ibid. 127).

Obviously, the replies by Bell and Simmons to the consent argument are dependent upon their claim that the principle of fairness is limited to cases where beneficiaries (voluntarily) accept the goods in question from the scheme. If the

principle of fairness applies to mere receipt as well as voluntary acceptance of benefits, then their replies are limited to cases where voluntary acceptance gives rise to the principle. Furthermore, Bell and Simmons owe us an account of ‘voluntary acceptance’ that differs from consent to the scheme without collapsing into mere receipt of benefits. I will discuss ‘voluntary acceptance’ in detail in section 6.2 and argue that mere receipt of benefits is sufficient for the principle of fairness. That will prove that the defence against the consent argument on the basis of voluntary acceptance is not sufficient to defend the principle of fairness that still operates in cases where beneficiaries merely receive the goods in question.

Arneson and McDonald argue that it is unnecessary for beneficiaries to consent because they obtain the fairness obligation directly from the right of cooperators (Arneson 1982; McDonald 1984). According to McDonald (1984), just as Nozick’s own individual right is claimed *without* reference to the consent of others, the right of cooperators brings about the fairness obligation on beneficiaries no matter whether the latter consent to the principle of fairness; thus the consent of beneficiaries is not crucial. McDonald criticises Nozick’s argument against the *enforceability* of the fairness obligation, which holds that the right of cooperators to the compliance of beneficiaries does not entail that the former can *force* the latter to follow the fairness obligation. McDonald points out that ‘the rights of *enforcement* associated with Nozick’s rights have a rationale not significantly different from the presumed rights generated by applications of the principle of fairness’ (McDonald 1984: 52-3, italics added). That is, for McDonald, just as Nozick’s individual right can be *enforced* without others’

consent, cooperators can *force* beneficiaries to come under the fairness obligation without their consent. The right of cooperators should be *enforced*, McDonald argues, because it is not the case that ‘we live in a world of morally serious persons who take the moral realm seriously, in a way that means that their recognition of their obligations was sufficient reason for fulfilling their obligations’ (ibid, 52).

No matter whether McDonald’s argument against Nozick’s argument is successful, it does not reject Nozick’s consent argument against the *generation* of the obligation. That argument holds that the right of cooperators to the compliance of beneficiaries cannot be *generated* in the absence of the latter’s consent. Even though the cooperators’ right to *force* beneficiaries does not need their consent, the right to the compliance of beneficiaries may need consent for its generation.

Arneson argues that cooperators obtain a right to the compliance of beneficiaries even without the consent of the latter and that this right also permits the former to force the latter to come under the fairness obligation. This is exactly the same as Nozick’s own property right that arises towards an obligation of others not to interfere with the right without the consent of the latter. He uses Nozick’s argument for property right in order to reject Nozick’s argument denying the right of cooperators. According to Arneson,

The point of Lockean property rules [Nozick employs for his theory of right] is to frustrate such desires [desires to benefit from others’ pains] and to “guarantee to individuals” the “fruits of their own labour and abstinence.” This norm would seem to have straightforward application

to the desires of would-be free riders to benefit from cooperative scheme without paying a fair share of the costs. The revised principle of fairness³⁷ encapsulates the moral conviction that it is legitimate to frustrate the desire to benefit from the pains of others when one has no right to the fruit of their pains (Arneson 1982: 628).

Having quoted Nozick's argument against the principle of fairness, Arneson argues as follows.

*Similarly, why is it legitimate for you to restrict my liberty, excluding me from the use of chunks of the earth, on the ground that your private appropriation of those chunks indirectly benefits me by providing me with economic opportunities or the like? I never requested those benefits or *consented* to the accompanying restriction of my liberty (ibid. 629, italics added).*

Following Nozick's theory of property right, Arneson answers this question by saying that a property right is justified by 'the conviction that property rules should not permit individuals to enjoy the benefits of the labor of others without their consent' (ibid. 629), and the same rationale justifies the principle of fairness. His argument for the right of cooperators depends upon Nozick's argument for property rights that holds that others obtain from one's property right an obligation not to violate the right. That is, on the basis of Nozick's theory of property rights, Arneson argues that the right of cooperators gives rise to both the fairness obligation and the enforceability of the obligation. He writes:

³⁷ Arneson revises the principle of fairness so that the principle accommodates both 'voluntary acceptance' and 'mere receipt' of benefits (Arneson 1982: 623).

To those beneficiaries of the mutual benefit scheme who complain that they are being coerced to share its cost despite the fact that they never consented to this imposition of coercion, the organizing cooperators point out that neither did they actually consent to neighbour Smith's appropriation of land as his private property, nor did they consent to the coercion required to sustain this appropriation (ibid. 624).

Arneson points out that the obligation to share the cost of mutual benefit and the constraint not to break property rights have the following in common: both requirements are for the sake of corresponding rights. In other words, others are required not to interfere with one's property to ensure that one reaps what one sows, while beneficiaries are to do their share so as not to gain from the cooperators' pain. Unless others are disallowed their liberty to intercept one's property, one loses what one has put an effort into. Similarly, Arneson claims, cooperators are not entitled to limit 'the benefits to those who are willing to contribute to their costs' in the absence of the principle of fairness (ibid. 627).

The analogy between an obligation corresponding to a property right and the fairness obligation connected to the right of cooperators is not strong enough to overcome an important difference between the two obligations. This difference means that the idea of consent may become of significance in the case of the fairness obligation. On the one hand, B's obligation not to break into A's property may derive, without B's consent, from A's property right. This may be justified because A's appropriation does not make B and others worse off than they would have been had A not appropriated. More importantly, A's right is

absolute in the sense that A should not be harmed by B with regard to the labour A put into her property. In addition, *A's right is so exclusive that B and others are not entitled to use A's property, no matter whether B and others consent not to use A's property*, unless A permits it. A's has such a justifiable, absolute, and exclusive right that B has an obligation not to infringe A's right without consenting not to do so. B's obligation arises independently of his own consent.

On the other hand, beneficiaries in the principle of fairness may need to consent so as to be obligated to do their share. They may have a justifiable liberty to benefit from the effort of cooperators partly because the goods in question can be legitimately as well as technically non-excludable. For example everyone has a basic right to national security even before doing one's share in return³⁸, and more importantly because the act of benefiting does not make cooperators worse off than they would be had there been no beneficiaries. When the goods in question are non-rival in their consumption, beneficiaries do not harm cooperators by benefiting from the goods produced by the effort of the latter. In this light, the right of cooperators to the goods in question is not so absolute or exclusive, so beneficiaries still have a liberty to benefit from their effort. This liberty of beneficiaries may allow them to benefit without doing their share unless it is presupposed that they have a natural duty to do their share in return for benefit or *unless they consent not to benefit without sharing the burden*. Nozick chooses the latter case and argues for the necessity of consent for the

³⁸ Nozick would not rely, for a justifiable liberty for beneficiaries to benefit from others' effort, on the claim that they have a basic right to national security. However, this claim still supports such a justifiable liberty for beneficiaries, at least in part.

principle of fairness.³⁹

6.1.4. Some necessary conditions for the fairness obligation

It has been noted that Nozick himself contends that individuals have a right to be free from the interference of others, which corresponds with an obligation on others not to interfere irrespective of their consent not to do so. This sheds light on the necessity of consent in his argument against the principle of fairness. As he concludes his argument by saying that ‘even if the principle could be formulated so that it was no longer open to objection, it would not serve to obviate the need for other persons’ *consenting* to cooperate and limit their own activities’ (Nozick 1974: 95, his italic), he implies that there is something special about the cases in which the principle of fairness applies, to make that consent necessary.

A reason for Nozick to take consent so seriously is, I think, that he understands that the principle of fairness imposes an obligation that is assented to by one group of people on *another* group of people. As discussed above, he claims that people decide to bind *themselves* to relevant rules for the production of something, and then require *others* to do their share in return for the good in

³⁹ The fact that beneficiaries do not harm cooperators by benefiting from their effort does not imply that it is wrong for cooperators to require beneficiaries to do their share. Thus, the principle of fairness can go on without consent of beneficiaries to such requirement. However, this fact can be employed for a justifiable but non-absolute and non-exclusive right of cooperators and also for a justifiable liberty for beneficiaries to benefit from the effort of cooperators, which eventually requires consent from beneficiaries for their being bound to the fairness obligation.

question, simply because others benefit from their effort.

Nozick's misunderstanding of the principle of fairness comes from his examples that do not reflect some important conditions about cooperators and a cooperative scheme. Bell points out the conditions Nozick's examples fail to satisfy:

The rules of the institution are specified (and public), the institution as such is just or fair (ruling out, for example, promises made under duress, extorted consent or the like), persons engage in a mutually advantageous venture according to those rules. These are the background conditions which must be met before the principle of fairness even comes into play. None of these is met in Nozick's example as far as I can tell (Bell 1978: 69).

Nozick uses five examples altogether to raise his objection to the principle of fairness. In none of these is it not clear that the goods in question are provided by a cooperative scheme in which cooperators follow the scheme's rules with a sense of obligation. In the example of the PA system, the participants in the system do not seem to have a sense of obligation when they do their share. As the whole story shows, particularly the phrase 'one can easily switch days', they seem to join the system voluntarily - as if they enjoy doing their share, not minding free-riding. In the street sweeping example which asks 'if each day a different person on your street sweeps the entire street, must you do so when your time comes?' (Nozick 1974: 94), there seems to be no mention about the compliance of cooperators.

In the next three examples, there is no scheme of cooperation set up for

the provision of the goods in question and maintained by the compliance of cooperators with relevant rules. To cite one such example: ‘must you mow your front lawn as often as your neighbours mow theirs?’ (ibid. 94, the other two examples are on page 95). Nozick understands the principle of fairness as requiring an obligation only if people benefit from something. This is indicated by the following: ‘acceptance of benefits is enough, according to this principle’ (ibid. 90). It is natural and obvious to say that there is no obligation to do one’s share in return for benefit that just happens to be given. For example, even though we enjoy fireworks performed by a group of people at night, we do not have an obligation to organise a firework display unless we have consented to do so. Because of these issues, Nozick employs ‘consent’ as a necessary condition without which beneficiaries do not acquire an obligation to do their share in return for benefit just given. He understands the principle of fairness so simply that he does not treat as relevant the presence of a cooperative scheme in which cooperators abide by the scheme’s rules with a sense of obligation.

A failure to presuppose the presence of a cooperative scheme and the compliance of cooperators allows Nozick to miss another important condition about the scheme: being set up through a democratic process in the senses both (i) that those who are under the effect of the scheme are consulted about setting up the scheme for the provision of certain goods and (ii) that a majority of them agree on the rules of the scheme. In order to be reasonably just and fair to both the members and the non-members, a cooperative scheme in the principle of fairness should satisfy the condition of being democratically established. First, all (potential) beneficiaries of a cooperative scheme should have been consulted

about setting up the scheme for the provision of the goods, so that the rules of the scheme are publicly known to those who are to be provided with the goods. Second, in addition to this publicity of the scheme, a majority of (potential) beneficiaries should agree on the scheme's rules. Including a democratic dimension in the characterisation of a cooperative scheme in terms of its publicity and the agreement on its rules by the majority ensures not only that the scheme is just and legitimate to all beneficiaries in general but also that both cooperators and beneficiaries are treated in a fair way. On the one hand, it is fair to beneficiaries that they are required to do their share only when they have been consulted about establishing the scheme and the rules of the scheme are agreed by a majority of beneficiaries. On the other hand, it is fair to cooperators that they know that all (potential) beneficiaries are consulted and a majority of them agree on the scheme's rules, and thus there will be no beneficiaries who can escape from the fairness obligation. This differs from the consent argument

If the PA system has been established not just for amusement by voluntary cooperators but for the production of a good by the compliance of cooperators with compulsory requirement, *and* if the system has been democratically set up in the sense that all beneficiaries including Nozick are consulted about its establishment and a majority of them agree on its rules, then Nozick is to come under the fairness obligation even though he has not consented or even objected personally to the scheme because he benefits from a cooperative scheme as such.

6.1.5.A summary

To sum up the discussion so far: the consent argument holds that beneficiaries should not be required to follow the rules of a cooperative scheme without their own individual consent to do so. Basically, the principle of fairness is not a theory of voluntary obligation that refers to the way an obligation is generated but an obligation that is based on a natural duty and triggered by an act of benefiting.

The replies by several philosophers to the consent argument levelled against the principle of fairness argue that beneficiaries do not need to consent to the rules of a cooperative scheme either because they tacitly consent to the rules by voluntarily accepting the goods in question or because the right of cooperators is so exclusive that beneficiaries obtain the fairness obligation without their consent.

However, tacit consent through voluntary acceptance of the goods in question is still a kind of consent that requires an intention to be bound to the fairness obligation. The right of cooperators is not as exclusive as Nozick's property right in the sense that cooperators are not made worse off than they would have been had there been no beneficiaries. A's property right should be protected by an obligation of B and others not to take advantage of the effort made by A.

Nozick's consent argument does not fail because beneficiaries do not need to consent for the suggested reasons, but because it does not take as relevant some necessary conditions for the principle of fairness such as the presence of a cooperative scheme, the compliance of cooperators, and

democratic features of the scheme. When these conditions are all met, there is no need to consent to the rules of the scheme. The consent argument does not recognise that certain obligations are not incurred via consent, and one such obligation, the fairness obligation, is grounded on the duty to do one's fair share.

6.2. THE LIMITING ARGUMENT

One of two conditions suggested by Rawls for the principle of fairness is 'the voluntary acceptance of benefits' (Rawls 1964: 10; 1971: 112), with which he proposes a voluntary acceptance version of the principle. On the basis of the voluntary acceptance condition, which Rawls does not discuss in detail, Simmons raises the limiting argument against the principle of fairness. This limits the applicability of the principle to cases where beneficiaries *voluntarily accept* the goods in question. According to him, cases in which individuals merely receive benefits do not generate an obligation to do a fair share. Arneson and Klosko reply to the limiting argument by appealing to, respectively but similarly, 'pure public goods' and 'the indispensability of benefits'.

This section examines the replies by Arneson and Klosko respectively, and finds Klosko rather supportive of the limiting argument in a sense that will be explained, and Arneson unsuccessful in denying the possibility of voluntary acceptance. Simmons' understanding of voluntary acceptance is not adequate to measure the voluntariness of beneficiaries in a relevant sense. I suggest taking into consideration the degree of *involuntariness* of beneficiaries with regard to

identifying the responsibility for free-riding. To begin with, I delineate the limiting argument.

6.2.1. The limiting argument

The basic idea of the limiting argument is that beneficiaries are under the fairness obligation to do a fair share in return *only* for the goods that they voluntarily accept. In other words, if beneficiaries *merely receive* the goods without an intention to accept them, they are not to be required to do their share in return.

There are two facts on which the limiting argument is relying; non-excludability of the goods and the intention of beneficiaries. First, non-excludability does not give beneficiaries freedom not to receive the goods, and thus it is more than likely that beneficiaries are forced to receive them. In Simmons' terms, the goods are 'open' in the sense that beneficiaries cannot avoid receiving them 'without a considerable inconvenience', and thus 'open' benefits are mostly received without a special intention to accept them (Simmons 1979, 130-1). Because the goods are supplied to anyone in a cooperative scheme, sometimes even to those outside the scheme, the intention of beneficiaries is disregarded, in which case beneficiaries should not be obligated to do their share.

Second, it is sometimes the case that beneficiaries do not want to receive the goods because they do not like them for personal but reasonable reasons. If beneficiaries are just given what they do not want, they should not be forced to do their share, according to the limiting argument. Simmons holds that there are very few citizens who want to accept the benefits from a political cooperative

scheme because the benefits are not worth the cost they are required to pay (ibid. 139). A majority of beneficiaries do not have the intention to benefit from the provision of the goods in question, but are just given them, for which they are not to be required to do their share in return.

The problem with the principle of fairness, according to the limiting argument, is that non-excludability of the goods in question and the non-intention of beneficiaries to accept the goods ‘significantly reduce the number of individuals who receive open benefits, who can be taken to have [voluntarily] *accepted* those benefits’ (ibid. 132). Simmons not only limits the principle to cases where the goods are voluntarily accepted but also claims that there are scarcely any individuals who voluntarily accept the goods, so the principle is hardly applicable to normal beneficiaries who do not consciously and knowingly accept the goods.

6.2.2. Indispensability, non-excludability, and involuntariness

In order to overcome the limiting argument, Arneson identifies the kind of the goods that cannot be technically or efficiently excluded from people, which include *pure public goods* that ‘all members of the group must consume to the same quantity’ (Arneson 1982: 618). And he goes on to say that

once a pure public good is supplied to a group of persons, there cannot really be any voluntary acceptance or enjoyment of the benefit by individual consumers. One cannot voluntarily accept a good one cannot voluntarily reject (ibid. 619).

Arneson claims that in the provision of a collective good that is not ‘purely public’, ‘voluntary acceptance will generally be sufficient to place him [the beneficiary] under obligation’ (ibid. 620). However, he maintains that ‘where pure public goods are supplied, voluntary acceptance of benefits is impossible and so unnecessary to generate obligations according to the principle of fairness. Mere receipt of benefits may suffice to obligate’ (ibid. 620-1).

By the same token, Klosko limits the scope of the goods in question. He suggests ‘the indispensability proviso’ which holds that

because presumptive public goods are indispensable, in most cases the existence of a significant level of benefit can be assumed on the basis of the obvious facts of human existence, without making inquiries about A’s values or beliefs. By definition, presumptive public goods can be presumed to be of great value, without regard to such subjective factors’ (Klosko 1992: 48).

That is, the goods in question are so valuable that people *benefit* from their provision no matter whether they voluntarily accept them (ibid. 39). On the basis of the fact that people benefit from the provision of a good, Klosko claims that they incur an obligation to contribute to the scheme that produces the good.

It is noticed that, from the condition of voluntary acceptance, Klosko turns to a rationale for the fairness obligation. He does not argue that voluntary acceptance is unnecessary, but that to benefit from a scheme is sufficient, for the principle of fairness. Furthermore, Klosko’s indispensability proviso has the

implication that beneficiaries would voluntarily accept the goods in question because they are indispensable for an acceptable life; ‘because of the indispensability of national defence, it would not be rational for him to choose otherwise’; ‘because the benefits are indispensable, he could not say that he does not want them’ (ibid, 42). He emphasises that beneficiaries *benefit* from indispensable goods because they are indispensable irrespective of whether they want them or not. If the fact of benefiting is vital for Klosko, he does not need to narrow the applicability of the principle down to the provision of indispensable goods because people can *benefit* from dispensable as well as indispensable goods and thus should be required to make a contribution to the production of dispensable as well as indispensable goods.

In addition to the indispensability proviso, Klosko makes what he calls the indirect argument, according to which some dispensable goods are included in a package of the goods that are indispensable, so such dispensable goods are ‘practically indispensable’ in the sense that those goods are necessary for the provision of indispensable goods: ‘transportation’, ‘communication facilities’, and ‘some level of public education’, ‘the stability of the overall economy’, etc (Klosko 1992, 86-94). However, he includes dispensable goods in the goods in question because they are valuable in connection with indispensable goods, and thus because beneficiaries would voluntarily accept them. Ultimately, both the indispensability proviso and the indirect argument hold that beneficiaries would voluntarily accept the goods in question, which is not a counterargument to the limiting argument, but an endorsement of it.

Arneson is more focused on voluntariness of beneficiaries than Klosko.

Arneson holds that voluntary acceptance is not necessary in the case of pure public goods for the generation of the fairness obligation, because it is impossible to reject them. It is possible to choose to accept collective goods and thus it is necessary to accept them voluntarily to come under an obligation to make a return for them.

Arneson's argument about the voluntariness of beneficiaries has two parts. First, it is not possible to reject pure public goods. Second, it is necessary to accept collective goods voluntarily when and because it is possible to do so. The idea is that if the goods in question are collective goods, beneficiaries should accept the goods voluntarily so as to come under the fairness obligation. This leaves nothing but the intuition that voluntary acceptance is necessary or unnecessary depending on the possibility of choice, not because of any presumptive reason. Arneson's argument about collective goods eventually requires that beneficiaries should voluntarily accept the goods when it is possible to do so.

With regard to the first part of Arneson's argument about pure public goods, a question arises: does the impossibility of beneficiaries accepting voluntarily the goods in question entail that they do not have to voluntarily accept the goods? Arneson does not argue that it is unnecessary to voluntarily accept the goods, but only that it is impossible to do so, in the case of pure public goods. The impossibility of accepting benefits voluntarily is based on the idea that 'one cannot voluntarily accept a good one cannot voluntarily reject' (Arneson 1982: 619). This implies that when there is no choice but to receive such an essentially valuable good that no one would reject it, no one is able to

voluntarily accept it either. In addition, Arneson may employ ‘non-excludability’ of the goods and claim that it is technically or efficiently impossible for beneficiaries to reject the goods.

However, the impossibility of rejecting the goods in question does not automatically mean that beneficiaries cannot voluntarily accept the goods in question so as to come under the fairness obligation. Beneficiaries may be able to voluntarily accept the goods even if they have no alternatives and thus no chance to reject the only available goods. While having chances to do otherwise does not guarantee the voluntariness of acceptance, there being only one option does not necessarily undermine voluntariness either. Frankfurt sharply examines whether there being no option to do otherwise can invalidate a moral responsibility for doing what one did.

The fact that he could not have done otherwise clearly provides no basis for supposing that he *might* have done otherwise if he had been able to do so. When a fact is in this way irrelevant to the problem of accounting for a person’s action it seem quite gratuitous to assign it any weight in the assessment of his moral responsibility. Why should the fact be considered in reaching a moral judgment concerning the person when it does not help in any way to understand either what made him act as he did or what, in other circumstances, he might have done? (Frankfurt 1969: 837, his italics)

Following this line of argument, Olsaretti cleverly argues that

first, a choice is voluntary when there is an *acceptable* alternative;

secondly, a choice is voluntary when there is no acceptable alternative, *but* one (or even, the only one) option which is available is one which the agent likes so much that he chooses it because of that, and not because he has no acceptable alternative (Olsaretti 1998: 71-2, italics added).

It is not whether there is more than one option to choose from, but whether the agent is willing to take an option, that should be taken into account in determining the voluntariness of the agent. Even though there is more than one option to choose from, one may be ‘forced’ to select one if all options are unacceptable. However, one is able to voluntarily opt for the one that is the only available option, if one wants it. It is feasible that beneficiaries *voluntarily accept* the goods that they cannot reject, if they have an intention to accept them. It all depends on the intention of the agent, not the availability of choice.

In sum, the fact that there is no choice to do otherwise either because the goods are so essential or because the goods are non-excludable does not guarantee the idea that beneficiaries do not need to, or cannot, voluntarily accept the goods. The fact that the goods are so essential implies rather that beneficiaries would voluntarily accept them. The fact that it is technically or efficiently impossible to reject the goods does not necessarily mean that beneficiaries cannot intend to benefit from the goods. Voluntariness hinges on the intention of beneficiaries rather than the availability of choice. Arneson and Klosko in effect endorse the view that beneficiaries would voluntarily accept the goods in question, because there is no choice but to do so. This shows that they do not provide successful replies to the limiting argument, which holds that only those who voluntarily accept the goods are under the fairness obligation. We

need to look elsewhere for a plausible response to the limiting argument.

6.2.3. Simmons' definition of 'voluntary acceptance'

How can the voluntariness of an agent be gauged by her intention? Let me examine Simmons' definition of 'voluntary acceptance' to find the right conception of voluntariness necessary for the generation of the fairness obligation.

Simmons defines 'voluntary acceptance' by saying that 'to have [*voluntarily*] *accepted* a benefit in the right sense, I must

- have *wanted* that benefit when I received it, or
- have made some *effort* to get the benefit, or
- at least not have actively *attempted* to avoid getting it' (Simmons 1979: 108, italics added).

The first two definitions of 'voluntary acceptance' look too strong, while the last one looks too loose, to give us a clear idea about whether beneficiaries should be required to do their share in return for their benefit.

First, in order to have voluntarily accepted a benefit, I must have wanted it, according to Simmons. It is true that I have voluntarily accepted a benefit if I have wanted it. However, does it follow that if I have not wanted a benefit, then I have not voluntarily accepted it and thus should not be bound to the fairness obligation? What about if I have neither wanted nor rejected it? For example, I may not want a street light in front of my house but do not reject it and actually benefit from it. In this case, can I be described as an involuntary beneficiary and

thus be free from doing my share in return for the benefit only because I have not wanted it? I think not. In order to come under the fairness obligation, while it is necessary that I do not reject the benefit, it does not follow that it is necessary that I want it.

Second, for Simmons, to have voluntarily accepted a benefit, I must have made an effort to obtain it. It is true that I have voluntarily accepted a benefit when I have endeavoured to get it. However, this does not necessarily mean that if I have not made an effort to get a benefit, then I have not voluntarily accepted it and thus have no fairness obligation. Suppose that I have neither made an effort to get a benefit nor attempted to reject it. For example, I do not contact the local authority to request them to put a street light in front of my house, but nor do I take any action to reject it when I find the light helpful for my walking at night. Does this non-voluntary receipt of the benefit in Simmons' sense make the fairness obligation illegitimate? 'Making an effort' looks too strong to identify the voluntariness of an agent as a necessary condition for the fairness obligation.

Unlike the first two conceptions of voluntariness proposed by Simmons, the last one is too loose to catch the point of voluntariness as a necessary condition for the fairness obligation. Simmons steps back and says that 'at least I must have not attempted to avoid getting a benefit' (ibid. 108). This last conception of voluntariness faces a problem when I may have not tried to reject a benefit for another reason. For example, I may have not tried to stop the local authority putting a street light in front of my house because I know my neighbours wish for the light. Also, I may have not attempted to avoid getting the

benefit of national defence, not because I do not want national defence, but just because I do not want to leave the country where I was born; I want to speak my mother language and I want to share the culture and the traditions in which I have grown up⁴⁰. ‘No attempt to avoid getting a benefit’ is too loose to define voluntariness of beneficiaries for it may have nothing to do with the intention to benefit from the goods in question.

As Dagger points, Simmons’ description of voluntary acceptance is ‘consistent with neither ordinary use of “voluntary” nor common practice’ (Dagger 1997: 76). Simmons’ definition of the term is not clear and precise enough to assess whether beneficiaries should be obligated with regard to their attitude to the goods in question.

6.2.4. Degrees of involuntariness

Acknowledging ‘the extreme ambiguity of the signification’ of the word ‘voluntary’, Bentham proposes three ways to understand a voluntary act: ‘intentional’, ‘uncoerced’, and ‘spontaneous’. He suggests using ‘voluntary’ in different ways according to various circumstances.

By a voluntary act is meant sometimes, any act, in the performance of which the will has had any concern at all; in this sense it is synonymous

⁴⁰ In the same light, Arneson says that ‘of course, a person made uncomfortable by his enjoyment of national security could choose to emigrate to a remote land with no provision for national security, but declining to shoulder the immense costs of emigration does not render one’s acceptance of national security truly voluntary’ (Arneson 1982: 619).

to *intentional*: sometimes such acts only, in the production of which the will has been determined by motives not of a painful nature; in this sense it is synonymous to unconstrained, or *uncoerced*: sometime such acts only, in the production of which the will has been determined by motives, which, whether of the pleasurable or painful kind, occurred to a man himself, without being suggested by anybody else; in this sense it is synonymous to *spontaneous*. (Bentham 1970: 84, his italics)

In the very next sentence, he writes that ‘the sense of the word involuntary does not correspond completely to that of the word voluntary. Involuntary is used in opposition to intentional; and to unconstrained: but not to spontaneous’ (ibid. 84). That is, one is unintentional or forced to perform an *involuntary* act. In addition to ‘unintentional’ and ‘forced’, we may add ‘unwilling’ and ‘reluctant’ for what ‘involuntary’ would mean. To put all together, when one does something involuntarily, one does it unintentionally, unwillingly, reluctantly, or under threat. For beneficiaries to receive the goods in question *involuntarily* means that they are forced, unintentional, unwilling, or reluctant to receive them.

It is obvious that beneficiaries should not be required to do their share in return for the goods that they have been *forced* to receive *against their intention not to receive*. But, when one receives the goods simply unintentionally, it is not clear if one receives the goods involuntarily enough to be immune to the fairness obligation. For example, if I do not put any effort to benefit from a street light in front of my house, i.e., if I have no intention to benefit from the light but still find it useful, am I free from the fairness obligation? It is hard to answer ‘yes’ to this question. This is because when the street light is erected and lit through the effort of others who do their share with a sense of obligation, it is hardly fair for

me not to do my share in return for the benefit for the reason that I have not taken any action to have the light in front of my house.

It seems that there are degrees of voluntariness, which should be interpreted according to different circumstances. Feinberg argues that ‘the standard of voluntariness must be tailored to various special circumstances’ (Feinberg 1986: 121). According to him,

legal writers know that the forces and pressures, understandings and confusions, and other factors that determine voluntariness or involuntariness are themselves matters of degree, so that standards of voluntariness require that lines be drawn at points on scales, sometimes higher, sometimes lower, depending on the legal issue (ibid 121).

Feinberg’s ‘variable standard view’ on voluntariness is flexible in determining whether an agent performs an act voluntarily or not. According to specific cases, ‘the sliding marker’ moves from voluntary to involuntary in order to decide if an agent is voluntary enough to be responsible for her act or involuntary enough not to be responsible for her act. Thus, Feinberg suggests a couple of principles about determining the voluntariness of an agent. To introduce one of them, ‘the more risky the conduct the greater the degree of voluntariness required if the conduct is to be permitted’ (ibid. 118). If an agent enters into a contract that specifies a considerable penalty if broken, she needs to be more voluntary in making such a contract than when she makes a relatively less important promise. Above all, she needs to be aware of ‘terms and conditions’ more clearly than when she promises to buy her son a toy.

With regard to an act that may result in a moral wrong, I think, it is more useful to measure the degree of *involuntariness* rather than voluntariness because it gives clearer idea about whether the agent should not be held responsible for her act of benefiting, which may result in free-riding, a moral wrong. For example, if I have saved a drowning person, there is no morally relevant difference between a case where I have been forced to save and a case where I have been reluctant to save. In either case, I am not morally praiseworthy concerning my motive for saving the drowning person because I have saved him *involuntarily*. To be held responsible for her morally right act, an agent should act voluntarily. On the other hand, an agent's act should be sufficiently *involuntary* if she is not to be held responsible for her act. It is not enough to act merely involuntary in order not to be held responsible for a moral wrong. I may have pushed someone into a river because I was threatened with death unless I did it. Or, I may have pushed him purely by accident. In both cases, I have pushed him involuntarily, as a result of which the person has drowned. However, to push under coercion is enough to evade responsibility for the outcome while to push by accident is not. In the latter case, I may be excused to some extent but cannot be completely without responsibility for the outcome.

It is sufficient to distinguish between 'voluntary' and 'involuntary' when deciding whether an agent should be praised for her act. In contrast, the distinction between 'voluntary' and 'involuntary' is not sharp enough to judge whether an agent should be liable for her act. We need distinctions by which we can measure the degree of *involuntariness*. The table below distinguishes between 'voluntary' and 'involuntary' and divides 'involuntary' into strong and

weak cases.

Involuntary		Voluntary
Strong	Weak	Intentional Wanting Willing Deliberate Knowing
forced	Not intentional Not wanting Not willing Not deliberate Not knowing	
I am forced to benefit.	I do not intend to benefit.	I intend to benefit.

In deciding whether a person is responsible for a morally wrong act, we need to distinguish between strong and weak involuntariness, that is, a distinction between ‘sufficiently involuntary’ and ‘not sufficiently involuntary’ acts. In order for a person *not* to be held responsible for her act that has resulted in a moral wrong, she should have acted involuntarily in a strong sense that she has been forced to do it. However, a person is not sufficiently involuntary to avoid responsibility if she has not intended or not wanted to do an act, or if she has not been willing or not deliberately done it, or if she did not know that her act would give rise to a moral wrong. It is ambiguous to mention that a person has not done something on purpose if she should escape responsibility for her act that is morally wrong in principle. A person might have performed a moral wrong, which she was forced to do, or which she had no intention either to do or not to do. In both cases, she has acted involuntarily in the sense that it is not the

case that she has intended to do it. However, in the latter case where there is no intention either to do or not to do, she is not sufficiently involuntary to avoid responsibility for the moral wrong while the involuntariness in the former case where she was forced to do is strong enough to evade the responsibility. So called 'I did not mean it' is not sufficiently involuntary to be relieved of responsibility for a moral wrong while it is sufficiently involuntary to say that 'I did not mean it but I was coerced to do it'.

The context of the principle of fairness is that the goods in question are produced by a cooperative scheme of people who do their share according to the scheme's rules and it is basically unfair for beneficiaries of the scheme not to do their share in return; the non-compliance of beneficiaries brings about a moral wrong, free-riding. With this context in place, the degree of involuntariness should be as strong as possible in order for beneficiaries to avoid unfairness, unfairness of free-riding. That is, if beneficiaries receive the goods in question involuntarily in the sense that they have no intention either to benefit or not to benefit, their involuntariness is not strong enough to exempt them from the fairness obligation. However, if they are forced to benefit *against their intention not to receive them*, they are not to come under the fairness obligation because it is not fair to force them to benefit and share burden. Most, if not all, beneficiaries of non-excludable goods do not voluntarily, intentionally, willingly, knowingly, or deliberately accept the goods, which, however, does not mean that they are coerced to receive them against their intention not to receive them. Coerced receipt of benefit is strong enough, and unintentional receipt is not strong enough, to exempt beneficiaries from the fairness obligation.

The discussion so far suggests that even though beneficiaries merely, i.e., involuntarily, benefit from a cooperative scheme of others, they are still responsible for the benefit unless they have been forced to benefit. In order for them to avoid the responsibility, they should have benefited in spite of their intention not to benefit. Apart from the case where beneficiaries have been coerced to benefit, they are responsible for their benefit that they may have involuntarily received from a cooperative scheme of others.

6.2.5. A possible objection

One may point out that beneficiaries should ‘voluntarily accept’ the goods in question because only by doing so can they be said to have taken advantage of the effort of cooperators. According to Simmons, it is only when beneficiaries voluntarily accept the benefits that they exploit the sacrifice of cooperators, for which they can be accused of violating fairness and thus be obligated to do their share (Simmons 2001: 27-42).

An advantage-taking occurs only when one freely takes the benefits of cooperation with the requisite beliefs and preference structure, *not* when one merely unavoidably receives those benefits while going about one’s normally permissible business (ibid. 30-31, his italic).

In other words, if beneficiaries merely receive the benefits, especially unavoidably, they do not take advantage of cooperators because they do not intend to do so.

This claim is designed to mean that only if an act is voluntary, the actor

can be held responsible for its result, which seems to be right at a glance. However, as argued earlier, not only voluntary but also some involuntary beneficiaries should be required to do their share in return for their benefits. Except for beneficiaries who are forced to benefit against their intention not to benefit, those who involuntarily receive the goods are still to come under the fairness obligation. Even though they merely receive the goods in question just because they are unavoidable, their involuntariness is not sufficient to exempt them from the requirement to do their share in return. For example, asylum seekers settled in the UK intend to benefit from social security but have no proactive intention to benefit from national security, in which sense they do not voluntarily accept the benefit of national security. Nonetheless, if they do not make a contribution to the provision of national security despite their ability to do so, then it is the case that they take advantage of those who do their share in maintaining the security. Taking advantage is not dependent upon whether one voluntarily accepts a benefit from the effort of others, but upon whether or not one does one's share in return for one's benefit, unless one is forced to benefit from the sacrifice of others.

6.2.6.A summary

The limiting argument claims that only those who voluntarily accept the goods in question should be required to do their share. Klosko's reply is that reasonable beneficiaries would not reject but accept indispensable benefits for a decent living while Arneson's is that it is necessary to voluntarily accept collective goods that we can voluntarily accept and impossible to voluntarily accept pure

public goods that no one can reject. Klosko's indispensability argument and Arneson's argument about collective goods do not deny the importance of voluntary acceptance. They rather support it by supposing that reasonable beneficiaries would voluntarily accept indispensable goods or that it is necessary to voluntarily accept collective goods. In addition, Arneson's argument about the impossibility of rejecting pure public goods does not necessarily involve the impossibility of voluntary acceptance of the goods because one can still voluntarily accept a good that one cannot reject.

Simmons' understanding of the voluntariness of beneficiaries is either too strong or too loose to discern the right sense of sufficient voluntariness to locate responsibility for their act of benefiting. According to his conception of voluntariness, beneficiaries should have wanted to benefit or have made some effort to benefit. This is too strong because they can still enjoy the benefit even without their active intention. In addition, for Simmons, beneficiaries should have not attempted to avoid getting the benefit, which is too loose to catch the sense that they were acting sufficiently voluntarily to be held responsible, for instance, for their living in their native country.

Mere receipt of the goods in question is sufficient to identify the responsibility for free-riding, provided beneficiaries have not been forced to benefit against their intention not to benefit. Even though beneficiaries involuntarily receive the goods without their intention to benefit, they should be responsible for their act of benefiting, which may turn into free-riding, a moral wrong, unless they have been coerced to benefit. Thus, the principle of fairness applies not only in cases where beneficiaries voluntarily accept the goods in

question but also in cases where they merely receive the goods, except for the cases in which they are forced to benefit.

6.3. THE UTILITY ARGUMENT

While the consent and the limiting argument focus on the intention of beneficiaries, the utility argument highlights the utility of the fairness obligation. Smith looks into the consequence of the fairness obligation and proposes the utility argument that is sensitive to utility for a cooperative scheme; beneficiaries have no obligation to do their share if their share makes little difference to a cooperative scheme. Another utility argument, sensitive to utility for beneficiaries, is made by Nozick. He holds that it is not fair to require beneficiaries to bear a burden which is greater than their benefit or the burden on others.

This section examines Dagger's reply to the utility argument sensitive to utility for a cooperative scheme, and suggests pure moralism as a feature of the moral basis of the principle of fairness. Furthermore, Klosko's reply to the utility argument sensitive to utility for beneficiaries is slightly altered to be a sustainable reply.

6.3.1. Utility for a cooperative scheme

The main idea of Smith's utility argument against the principle of fairness is abbreviated to 'no benefit, no harm, no problem' by Dagger, who criticises

Smith's narrow conception of fairness (Dagger 1997: 70-2). The following is from Smith.

If *A*'s compliance with some particular rules does not benefit *B* and if his disobedience will not harm the community, it is difficult to see how fairness to *B* could dictate that *A* must comply. Surely, the fact that *A* has benefited from *B*'s submission does not give *B* the right to insist that *A* obey when *B*'s interests are not affected. *A* may in this situation have an obligation to obey, perhaps because he has promised or because his disobedience would be unfair to some other member; but, if he does disobey, he has surely not been unfair to *B* (Smith 1973: 956).

The utility argument holds that there is no problem because no loss is inflicted on cooperators, and then asks; why should beneficiaries reciprocate if it is not advantageous to cooperators, especially when their benefiting does not harm cooperators?

Smith agrees that his utility argument would make a weak case against the principle of fairness that applies to 'small, voluntary, cooperative enterprises' because 'virtually any disobedience may be expected to harm such [small] enterprises to some extent, by diminishing the confidence of other members in its probable success and therefore reducing their incentive to work diligently towards it' (ibid, 957). However, the utility argument produces a considerable challenge, Smith argues, to the principle of fairness in which the cooperative schemes are large enough to be able to neglect a tiny contribution from individual free-riders. In other words, the compliance of beneficiaries makes nearly zero contribution to large cooperative schemes, and thus their non-

compliance would not harm cooperators to any significant extent. For this reason, beneficiaries do not have to do their share in return for their benefit, according to the utility argument sensitive to utility for a cooperative scheme.

6.3.2. Reply by Dagger: egalitarian fairness

The utility argument is based on utility rather than fairness, which is focused on advantage and disadvantage in the relationship between beneficiaries and cooperators. Dagger accuses the utility argument of lacking a concept of fairness. He argues:

The problem with this [utility] argument is that it rests on an unduly narrow conception of fairness... everyone involved in a practice is to be treated as an equal... even when the interests of the parties involved are not affected, directly or indirectly, for one may be wronged (deceived, treated unfairly) without being harmed. Those who refuse to cooperate in a practice while they accept its benefits are acting unfairly and wronging those who do cooperate (Dagger 1997: 71).

Dagger turns to the right issue, i.e., fairness, which is missing in the utility argument. He rightly points out the lack of concern with fairness in the utility argument by saying that ‘we typically condemn tax cheaters because they do not play fair. Given his notion of fairness, however, Smith would have to say that the cheater is not acting unfairly unless there are some special circumstances’ (ibid. 71).

The conception of fairness Dagger appeals to is egalitarian in the sense that everyone should be treated equally. According to this universalist egalitarian

fairness, A's action is judged to be fair or not with reference to a universal requirement. Beneficiaries' non-compliance with the fairness obligation is unfair because all should comply with it. For Dagger, it is unfair not to do one's share because it breaks universalist egalitarian fairness.

Universalist egalitarian fairness can work as a moral foundation of the principle of fairness provided that it can ignore the inequality between cooperating beneficiaries and free-riders. As argued in chapter 3, this universal egalitarianism as a moral foundation for the fairness obligation falls into a dilemma when it faces an unavoidable fact that there are always some free-riders in any cooperative scheme where the goods in question are non-excludable. It is not feasible to appeal to the ideal of equality that normatively requires all beneficiaries to do their share when there are actually and always free-riding beneficiaries. The equal compliance between cooperators and complying beneficiaries breaks ironically the equal non-compliance between free-riders and non-complying beneficiaries. The compliance of beneficiaries achieves only partial equality, equality between them and cooperators, failing to accomplish equality between them and free-riders.

6.3.3. The principle of fairness as pure moralism

What the utility argument sensitive to utility for a cooperative scheme lacks is fairness as reciprocity that has a unilateral feature, rather than comparative fairness. Unlike the utility argument that appeals to the harmlessness of beneficiaries' non-compliance in their relationship with cooperators, the principle of fairness appeals to its wrongness by itself. It is wrong not to do one's

share not because it wrongs others who do their share but because it is wrong *per se*, no matter whether one's non-compliance is harmful to others.

Smith's utility argument rests on what Temkin calls the Slogan, according to which 'one situation *cannot* be worse (or better) than another if there is *no one* for whom it *is* worse (or better)' (Temkin 2002 in Clayton & Williams: 132, his italics). Temkin argues against the Slogan by employing several theories, one of which is proportional justice. He compares two situations, one in which the saints' quality of lives is much better than that of sinners as it should be, and one in which the saints' quality of lives is the same as their own in the first situation but that of sinners is much better than the saints' as it should not be. According to the Slogan, the second situation is better than the first one in the sense that it is not worse for the saints and better for the sinners. However, Temkin argues that

most would find this [Slogan] hard to accept... an outcome's being better or worse for people is *not* all that matters, proportional justice does too... [which] assesses outcomes in terms of what people *deserve*, and not merely in terms of whether people are *affected* for better or worse (regardless of desert) (ibid. 139, his italics).

Even though the second situation is better than the first one for there is no one for whom it is worse and someone for whom it is better, Temkin argues, the first situation is better than the second one from the point of proportional justice.

I would suggest that the first situation is *right* while the second one is *wrong*, rather than that the former is *better than* the latter. Temkin claims that one

should distinguish between ‘the goodness of outcomes’ and ‘what is good for individuals’ (ibid. 147), and suggests concluding that the first situation is a better outcome than the second one, not that the latter is better for the sinners (and not worse for the saints) than the former. However, the two situations are a matter of right or wrong, not of better or worse. It is *right* for the saints to have a better quality of lives than the sinners and the reverse is *wrong*. Thus, I claim that we should distinguish ‘the *rightness* of outcomes’ from ‘what is good for individuals’.

The principle of fairness applies to cases where it is the rightness of outcomes that matters, not what is good for cooperators and beneficiaries. Regardless of whether the compliance of beneficiaries is better for cooperators, it is right *on its own* for them to do their share in return for their benefit. It is wrong for beneficiaries not to do their share because it is inherently wrong to ‘exploit’⁴¹ the situation in which benefiting from the effort of cooperators does no harm to cooperators. Beneficiaries do not take advantage of cooperators, i.e., the agents, but the circumstance that cooperators do their share in return for their benefit. In this kind of exploitation, cooperators are not harmed at all, but it is still wrong by itself for beneficiaries to ‘play on’ (Feinberg 1990: 179) the situation where cooperators are involved in, and to ‘manipulate’ their compliance.

The principle of fairness shares with Feinberg’s ‘strict legal moralism or pure moralism’ the idea that ‘such and such activities are inherently immoral; therefore they should be prohibited even when private and harmless to

⁴¹ ‘Exploitation’ here does not mean exploiting labour of a person or a person herself, but exploiting the situation where a person is involved in. See Feinberg (1990: 177).

individuals' (Feinberg 1990: 125). On the basis of this idea, Feinberg argues for 'the exploitation principle' that 'warrants the criminal prohibition of unjust gain (exploitation per se) even when it causes no unfair loss (harm)' (ibid. 213). One of 'harmless wrongdoings' that 'the exploitation principle' should be employed against is 'parasitism' that is exactly the act of benefiting from the effort of others; 'noncoercive exploiters are often parasites; they make their livings by attaching themselves to others, and, without necessarily injuring their hosts, take their own gains as by-products of the host's activity' (ibid. 194). In this sense, the principle of fairness is pure moralism, which takes fairness as reciprocity more seriously than utility.

There is a sense that even though beneficiaries do not harm cooperators by simply benefiting from the scheme, they do harm by their *non-compliance* with the fairness obligation to the extent that their compliance would collectively lessen the burden borne by the cooperators. If the non-compliance of beneficiaries is harmful to cooperators, this is a good reason for beneficiaries to be required to do their share. Thus, the principle of fairness does not exclusively subscribe to a pure moralism but includes the case in which the compliance of beneficiaries reduces the burden the cooperators bear.

However, it is not primarily because the burden on cooperators is reduced by the compliance of beneficiaries that the latter should come under an obligation to comply with relevant rules. As argued in chapter 2, it needs to be presupposed that beneficiaries have a natural duty to do their share so that the right of cooperators not to be harmed overrides the right of beneficiaries not to follow relevant rules. Once it is established that beneficiaries have a natural duty

to do their share, the right of cooperators not to be harmed by the non-compliance of beneficiaries is a good additional reason for the fairness obligation to be imposed on beneficiaries.

6.3.4. Utility for beneficiaries and Klosko's reply

Another utility argument that is sensitive to utility for beneficiaries is focused on the balance between benefit and burden. Nozick holds that beneficiaries should not be required to bear a burden which is heavier than their benefit. He argues:

At the very least one wants to build into the principle of fairness the condition that the benefits to a person from the actions of the others are greater than the cost to him of doing his share (1974: 94).

That is, the benefits should outweigh the cost of doing one's share in the sense that beneficiaries like the benefits more than they dislike bearing the cost of doing their share.

To this utility argument, Klosko replies that the benefits are always worth the cost because the goods in question are (indirectly) indispensable for a decent life. He basically agrees with the utility argument that benefits must be worth the cost of them. However, this utility argument does not cause any problem because the argument works only when benefits are less valuable than the burden of doing one's share in return. For Klosko, who confines the goods in question to indispensable goods, beneficiaries would never become worse off from the exchange of benefit and burden. He points out that Nozick employs trivial examples because of which benefits might be regarded as less valuable than the

cost of bearing the burden in return. Klosko takes an example of military service; it is worthwhile to face some risk in military service rather than live without national defence (1992: 55).

For the argument that benefit is worth the cost of doing one's share in return, Klosko employs the idea that the cost is smaller than the difficulty caused by the absence of benefit. In other words, in order to argue that beneficiaries are better off even after having done their share in return, he shows that doing their share is easier than enduring the non-provision of benefit. However, the non-provision of benefit is not caused by the individual non-compliance of beneficiaries but by their collective non-compliance. It is not the non-provision of benefit that results from the individual non-compliance of beneficiaries, but the risk that they may be fined for their non-compliance. For example, even though an individual person does not pay her licence fee for her watching TV, the TV service is still available to her as well as others. What she gets from her not paying the fee is not the absence of the TV service but the risk of getting fined for free-riding. Thus, Klosko should have said that the cost of doing one's share in return for benefit is smaller than the risk of being fined for non-compliance. This is not always the case, though. In particular, when it is hardly possible or too costly to identify free-riders, it will be easier to benefit and be at risk of being fined for free-riding than doing one's share in return for benefit.

In order to hold that benefit is worth the cost of doing one's share in return, Klosko should have argued that individual benefit outweighs the individual burden in return, which is not a hard case to make. It will be generally agreed that a life under national security is more important than some risk in

military service or the tax for national security. A good for the production of which cooperators comply with relevant rules is more valuable than the burden that individual beneficiaries are required to share in return for their benefit.

6.3.5.A summary

The utility argument sensitive to utility for a cooperative scheme argues that it is not useful for beneficiaries to comply with the rules of the scheme if their compliance makes little contribution to the scheme. Dagger accuses this utility argument of lacking a concept of fairness, which is for him universalist egalitarian in its nature. That is, every beneficiary should do their share no matter whether their compliance makes little contribution to the scheme from which they benefit. Dagger's reply can work as a basis of the fairness obligation if and only if it is presupposed that all beneficiaries have a natural duty to do their share, independently of the usefulness of their compliance. The principle of fairness subscribes to a pure moralism, according to which it is intrinsically unfair to take advantage of the situation in which benefiting from a cooperative scheme does not harm the cooperators. The principle of fairness does not exclusively appeal to a pure moralism, but also takes into consideration the harm caused by the non-compliance of beneficiaries, giving priority to the natural duty to do one's share.

The utility argument sensitive to utility for beneficiaries holds that beneficiaries should not be required to bear burden that is greater than their benefit. Klosko replies that the burden is lighter than the non-provision of the benefit. However, the non-provision of the benefit is not caused by the individual but collective non-compliance of beneficiaries. The goods in question that are

provided by the collective compliance of cooperators are more valuable than the burden to be shared by individual beneficiaries.

6.4. CONCLUSION

This chapter has rebutted three main objections levelled at the principle of fairness. Because a summary has been made at the end of each section that dealt with three objections respectively, this concluding section does not summarise the chapter. Instead, having met the main objections, the revised principle of fairness is stated once again with some amplified explanations.

The Revised Principle of Fairness

- Individuals who are not forced to but voluntarily or merely benefit from
- a sufficiently just and legitimate scheme of cooperation set up and/or maintained through democratic procedures by
- others (cooperators) who do their share by complying with the scheme's rules even without the intention to produce
- non-excludable goods directly or indirectly that must be more valuable than the burden to be shared by beneficiaries,
- have an obligation to do their fair share in return for their benefit according to the rules of the scheme.

Having been morally founded, defended from its main objections, and

restated with enhanced explanations, the principle of fairness is now ready to apply to a practical issue, global climate change.

7. THE PRINCIPLE OF FAIRNESS AND CLIMATE CHANGE REGIMES

The American Clean Energy and Security Act of 2009 requires the US to reduce GHG emissions 17% below 2005 levels by 2020, while its Kyoto target is 7% below 1990 levels by 2012.

If the US follows its own regulation, it will be emitting 5,961 Million Mega Tons of CO₂ in 2020, while it will be emitting 5,753 Million Mega Tons of CO₂ in 2012 if it follows the Kyoto target.

7.0. INTRODUCTION

The thesis has so far elaborated the principle of fairness by establishing its moral foundation, identifying its conditions, and rebutting main objections levelled against it. Having gone through these processes, we finally have the revised principle of fairness, which reflects all the ideas that support and present the principle as an intuitively attractive theory of obligation. It is now time to test-drive the principle so as to see how it practically justifies an obligation to follow rules of a cooperative scheme from which one benefits. This last chapter applies the principle of fairness to the global issue of climate change and sees how it works as a successful theory of obligation.

There is widespread agreement that something should be done about climate change. According to climate scientists, climate change is causing global warming that will badly affect the present and the future lives of people unless

something is urgently done about it. Thus, it is claimed that we should bear what is called ‘the climate burden’, i.e., tackling climate change by helping those adversely affected by climate change cope with the change and reducing GHG emissions so that there will be fewer ill-effects of climate change in the present and the future.

A normative question arises. Who should bear the climate burden? This question needs to be divided into two different questions; what is a just or fair distribution of the climate burden or who should bear the burden (the question of justice) and when is an individual or country under a moral obligation to follow certain rules of sharing and bearing the burden (the question of obligation)? The question of justice is designed to find principles that apply to a society such that there is a fair distribution of benefits and burdens associated with climate change. By contrast, the question of obligation asks how to justify holding individuals under an obligation to follow the rules of the society of which they are members, or how to justify holding an individual society/country under an obligation to follow global rules. I will not discuss how climate change regimes can be just in distributing the climate burden, but bearing in mind that there are already such regimes that are reasonably just in tackling climate change, I will focus on the question of obligation with the following question in mind, which I call *the question of climate obligation*: under which circumstances are we morally obligated to follow requirements of climate change regimes? A more detailed distinction between the question of climate obligation and that of climate justice is made in Section 7.2.

To the question of climate obligation, the principle of fairness asserts

that those who benefit from certain climate change regimes have an obligation to follow the rules of the regimes. For the justification of the obligation in question, the principle of fairness appeals to the idea of fairness as reciprocity, which will be explained in detail in Section 7.3. In the following three sections, it is argued that the principle of fairness is to be preferred to other theories as a theory of climate obligation. These other theories are consent theory (Section 7.4), natural duty theory (Section 7.5), and the normal justification thesis proposed by Raz (Section 7.6). In the concluding Section 7.7, it is pointed out that the argument for the principle of fairness as a theory of climate obligation establishes that a theory of climate obligation does not collapse into the discussion about a theory of climate justice. Before going on to the main discussions, I shall briefly take an overview, in Section 7.1, of climate change regimes that have developed at various levels. This will remind us of the main question - why should we comply with rules of climate change regimes?

7.1. CLIMATE CHANGE REGIMES

There have been institutional and individual efforts to cope with climate change at different levels: international, national, and individual. The United Nations (UN) established the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 and produced the Kyoto Protocol, which was adopted in 1997, was ratified since 1998, and came into force in 2005. The UN was spurred to create the UNFCCC by the First Assessment Report 1990 of the

Intergovernmental Panel on Climate Change (IPCC) that reviews worldwide research on climate change and publishes assessment reports. According to the IPCC (1992: 52)⁴²,

Global mean surface air temperature has increased by 0.3 to 0.6 C over the last 100 years, with the five global-average warmest years being in the 1980's. Over the same period global sea-level increased by 10 to 20 cm. These have not been smooth in time, nor uniform over the globe.

On the basis of this finding, the IPCC assessed the potential impacts of climate change, such as:

- an effective doubling of CO₂ in the atmosphere between now and 2025 to 2050,
- a consequent increase of global mean temperature in the range of 1.5 C to 4.5 C,
- an unequal global distribution of this temperature increase, namely a smaller increase of half the global mean in the tropical regions and a larger increase of twice the global mean in the polar regions, and
- a sea-level rise of about 0.3 – 0.5 m by 2050 and about 1 m by 2100, together with a rise in the temperature of the surface ocean layer of between 0.2 and 2.5 C (IPCC 1992: 53).

These potential impacts of climate change will affect various aspects of human

⁴² The IPCC updated its Assessment Report in 1995, 2001, and 2007. However, the First Assessment Report in 1992 is quoted here because the UNFCCC was established on the basis of the First Assessment Report.

lives, according to the First Assessment Report: ‘agriculture and forestry, natural terrestrial ecosystems, hydrology and water resources, human settlements, energy, transport, and industrial sectors, human health, and air quality, oceans and coastal zones, seasonal snow cover, ice and permafrost’ (ibid, 54-6).

This alarming report by the IPCC motivated most countries in the globe to sign on the UNFCCC that came into force in 1994. The ultimate objective of the UNFCCC is ‘to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (UNFCCC 1992: Article 2). In achieving this ultimate objective, the UNFCCC set up principles that inform the subsequent treaties, such as the following.

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof (UNFCCC 1992: Article 3.1).

The principle of ‘common but differentiated responsibilities’ opened the way to the next principle that takes into consideration different contributions to climate change from developed and developing countries.

The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing

country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration (ibid, Article 3.2.)

Perhaps because this international treaty suggests only abstract objectives and principles and requires voluntary commitments, most countries in the world have agreed to it and ratified. The treaty currently enjoys nearly universal agreement and ratification from 193 countries, including the US and one organisation, the EU.

Furthermore, the Kyoto Protocol to the UNFCCC that requires practical and concrete commitments received ratification from most countries from 1998. The US, an exception, was the most polluting country until 2006⁴³. The Protocol requires ‘the Parties included in Annex I [i.e., developed countries] to reduce their overall GHG emissions by at least 5% below 1990 levels in the commitment period 2008 to 2012’ (UNFCCC 1998: Article 3.1.). The Protocol was also ratified by China, which was not included in Annex I Parties and is now the most polluting country in the world since 2006. The UNFCCC has tried to produce a more practical and binding agreement in Copenhagen in 2009 for the following commitment period. This was neither productive nor ratified at all at least until 2010.

Even though international efforts have been made to tackle global

⁴³ China overtook the US as the most emitting country in 2006 according to Netherlands Environmental Assessment Agency.

<http://www.pbl.nl/en/dossiers/Climatechange/moreinfo/Chinanowno1inCO2emissionsUSAinsecondposition.html>

climate change since the UNFCCC was established in 1992, not every individual country follows the CO₂ reduction requirement made by the Kyoto Protocol. China, the most polluting country since 2006, does not have to reduce GHG emissions at all because the country was not included in the Annex I Parties. This is because China made little contribution to, and thus is not responsible for, global climate change before 1990. Even if China were included in the Annex I Parties, it would not follow the CO₂ reduction requirement firstly because its CO₂ emissions level in 1990 (2400 mega tonnes) is too low in comparison with the level in 2006 (6100 mega tonnes) and secondly because its per capita CO₂ emissions in 2006 is only 4.62 tonnes while that of the US in the same year is 19.70 tonnes⁴⁴. China has three reasons not to comply with the CO₂ reduction requirement: it is not responsible for the world's CO₂ emissions before 1990; the CO₂ reduction requirement is excessively demanding in light of its base year emissions level; it has a right to emit more CO₂ for industrial development for its huge population. There is one more reason that discharges China from the CO₂ emissions reduction requirement; the US, the greatest contributor to the world CO₂ emissions in history⁴⁵ did not ratify the Kyoto Protocol and is not bound to the requirement.

The United Kingdom is one of the leading countries to tackle global climate change; it signed the Kyoto Protocol in 1998 and ratified it in 2002. The UK, having already set up in 1997 higher CO₂ emissions reduction target (20%

⁴⁴ United Nations Statistics Division,

http://unstats.un.org/unsd/environment/air_co2_emissions.htm

⁴⁵ World Resources Institute, <http://cait.wri.org/figures.php?page=ntn/6-3>

until 2010) than its assigned target given by the Kyoto Protocol (12.5% until 2012), reduced CO₂ emissions in 2008 by 19.4% below its 1990 level, which squarely reaches the Kyoto Protocol target for the country⁴⁶. Recently, the UK became the first country in the world that enacted a Climate Change Act in 2008 that has some legal enforcement in the country. For example, 'it is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline (Climate Change Act 2008: Part 1, The target for 2050).

In addition to these national and global initiatives, an increasing number of individuals are realising the importance of climate change and try to avoid activities that contribute to GHG emissions. Some people try not to drive but ride a bicycle to save the cost of petrol *and* the earth. An increasing number of people are planning to have loft and cavity wall insulation to reduce energy consumption. Most people now use energy saving light bulbs, which have nearly replaced inefficient light bulbs, and so on.

There have, then, been ongoing institutional and individual efforts at various levels to deal with climate change since it was known that the atmosphere was seriously vulnerable to the change. However, why should we abide by the rules set up for tackling climate change?

⁴⁶ Department of Energy and Climate Change, UK,
http://www.decc.gov.uk/en/content/cms/statistics/climate_change/gg_emissions/uk_emissions/2008_final/2008_final.aspx

7.2. THE QUESTION OF CLIMATE OBLIGATION

In discussing political morality as it relates to climate change, it is important to draw a distinction between two questions: the question of climate justice and the question of climate obligation.

On the one hand, the question of climate justice is concerned with how or between whom to distribute the climate burden and asks the following question: who should bear the climate burden? To this question, theories of climate justice make different suggestions according to their different reasoning. One answer to the question of climate justice is given by the polluter pays principle (the PPP), according to which it is the polluters who should bear the climate burden. Because it appeals to the strong intuition that those who are causally responsible for a problem should deal with it, the PPP has been employed as philosophical basis by many institutions and organisations such as the UN⁴⁷, the EU⁴⁸, and the OECD⁴⁹. However, the PPP can be criticised to be too ideal to work as a theory in a non-ideal world where there are a number of non-compliers, when compared to the ability to pay principle (the APP). The APP holds that it is those most capable of bearing the climate burden who should do so because they have the capacity and they can't ignore the basic interests of those who would otherwise suffer from climate change. Caney argues that 'the duty to ensure that people can enjoy their human rights (including the right not to

⁴⁷ UN (1992) Rio Declaration on Environment and Development 1992, Principle 16.

⁴⁸ European Parliament, Council (2004) *Directive 2004/35/CE*.

⁴⁹ OECD (1975) *The Polluter Pays Principle: Definition, Analysis, Implementation*, Paris.

be impoverished) falls on all persons who can help' (Caney 2007: 287).

The question of climate justice is to be distinguished from the question of climate obligation. The issue of climate justice is the issue of how to characterise a fair distribution of benefits and burdens without reference to a scheme of cooperation to tackle climate change. Thus, theories of climate justice are mainly interested in how an organisation should distribute the climate burden and suggest an organisation that allocates the burden to the polluters, those who are capable of bearing the burden or someone else. This is a necessary discussion about climate change regimes.

On the other hand, once some formal or informal schemes of cooperation to tackle climate change are set up and running, an important question is the question of climate obligation, i.e., why should we participate in such efforts? The problem of climate obligation is distinguished from other problems by the fact that there is a burden that should be borne by someone and the burden is already being shared by a cooperative scheme of those who are not necessarily responsible for the problem. Thus, an important question is the question of climate obligation. i.e., why do we have an obligation to comply with rules of climate change regimes? The question of climate obligation is not devised for a discussion about how a society or country should be organised in distributing the climate burden between its members, but about why individual countries or individual persons should follow the rules of an organisation which is established and maintained for tackling climate change, and to which they belong or are linked in a meaningful sense.

7.3. THE PRINCIPLE OF FAIRNESS AS A THEORY OF CLIMATE OBLIGATION

This section presents the principle of fairness as a promising theory of climate obligation. The revised principle of fairness states as follows:

individuals who are not forced to but merely benefit from a sufficiently just scheme of cooperation that is set up/maintained through democratic procedures by others (cooperators) who do their share by following the scheme's rules even without the intention to produce non-excludable goods directly or indirectly that must be more valuable than the burden to be shared by beneficiaries, have an obligation to do their fair share in return for their benefit according to the rules of the scheme.

To apply this principle⁵⁰ briefly to the problem of climate obligation, beneficiaries of a cooperative scheme created and maintained by others to tackle climate change have an obligation to follow the rules of the scheme, which is morally founded on fairness as reciprocity and is actually triggered by the fact that they benefit from the scheme.

Before going on to the main idea of the principle of fairness with regard to the problem of climate obligation, the agent of the fairness obligation needs clarifying. According to the principle of fairness, beneficiaries of a cooperative scheme have an obligation to do their share in return for their benefit from the scheme. Beneficiaries, the fairness obligation bearers can be either individual persons or a group of individual persons in a domestic or international society

⁵⁰ I call the revised principle of fairness the principle of fairness hereafter.

depending on who are the cooperators who comply with the rules of the scheme from which beneficiaries benefit. If a scheme of cooperation has been established by the compliance of individual persons with the scheme's rules, beneficiaries of the scheme must be individual persons too. If nation-states have set up an international scheme of cooperation to tackle global climate change, beneficiaries of the scheme can be individual persons as well as nation states. However, in case where a scheme of cooperation has been set up by the compliance of nation-states in an international society, the agents of the fairness obligation are nation-states both because the benefit in question has been produced by the compliance of nation-states and because beneficiaries are required to do their share according to the rules of the scheme that bind nation-states.

Thus, it does not matter whether individual persons in a domestic society or nation-states in an international society are the ones that should come under the fairness obligation. What matters is who the cooperators of a scheme that produces the goods in question are. In the case of the problem of climate obligation, it can be either individual persons or individual countries that are to come under the fairness obligation depending on from what kind of cooperative scheme beneficiaries benefit. If it is an international scheme such as the Kyoto Protocol that individual countries have agreed and are following its requirements, then it is individual countries that should follow the requirements as the principle of fairness requires. If it is, for example, the Climate Change Act 2008 in the UK from which individual persons benefit in the sense that will be explored in detail in a while, then it is individual citizens of the country who should be required to

do their share in return for their benefit.

This is because nation-states can act as a collective but individual agent in international society. Just as global corporations act as a legal person and thus can be liable for an obligation, nation-states perform an individual act such as making international treaties and can be bound to them. Individual persons and nation-states as a collective agent can be equally liable for an obligation to do one's share in return for one's benefit.⁵¹

Turning to the main idea of the principle of fairness, we have a natural duty to reciprocate our benefit received from an effort made by others. Unless we are forced to receive a benefit, we have a natural duty to make a return for something we receive thanks to an effort by others. Even when we receive a gift, something given without any expectation from the giver, we feel duty-bound to give something back to the giver; showing gratitude will do in this case. Then, it is more natural for us to be obligated to reciprocate what we receive from the sacrifice of others. Furthermore, our natural duty to do a share in return for our benefit is activated when we actually receive something from others. We are obligated to make a return to the particular effort that has made the goods in question available to us, in which sense we have a special obligation. Climate change regimes are set up and maintained by the compliance of others with

⁵¹ There is a further question of the conditions under which it is appropriate to hold a collective body as represented by its political institutions as under an obligation. For example, it may be inappropriate if the citizenry is governed by oppressive institutions. But all that needs to be established for the principle of fairness to operate is for collective liability to be possible and there is widespread agreement among legal and political philosophers that this is the case.

relevant rules, from which we can benefit even without doing our share.⁵² The principle of fairness asserts that we have the fairness obligation to do our share in climate change regimes because it is fair to reciprocate and when we actually benefit from them.

The fairness obligation required by fairness as reciprocity comprises one's own share and a fair share. First, according to fairness as reciprocity, beneficiaries of climate change regimes are required to do *their own share* in return for their benefit because it is fair and right to reciprocate their benefit. To reciprocate is an act expected from a recipient of benefit; it is naturally expected that one makes a return for one's benefit, especially when one benefits from an effort of others. Reciprocity is normally understood as a concept of complementarity between both parties in the sense that one party can give and take only in a relationship with another party. However, reciprocity is a unilateral concept that takes place 'within' one party, i.e., it is the same party who gives and takes something. Thus, when a beneficiary enjoys an improved atmosphere made available by a cooperative scheme of others, it is the beneficiary who is required to make a return for the benefit. Fairness as reciprocity requires beneficiaries to reciprocate a benefit that they receive from an effort of others.⁵³

In addition to one's own share, fairness as reciprocity requires beneficiaries to do a fair share, that is, to do their share in accordance with the rules of the scheme from which they benefit. There may be a gap between doing

⁵² The relevant sense in which we benefit from climate change regimes will be discussed in detail later on.

⁵³ A detailed elucidation of the concept of reciprocity can be found in chapter 4.

one's share and following the rules of the scheme. An explanation is necessary for requiring beneficiaries to do their share not according to their own judgement but by following rules of a cooperative scheme. That is, why do beneficiaries have to comply with rules of climate change regimes when they are required to do their share in return for their benefit from the regimes? There are several reasons why beneficiaries should follow the rules of the regimes:

- they benefit from a scheme of cooperation that is established and maintained by the compliance of others with its rules,
- all beneficiaries of the scheme should equally comply with the same rules,
- the rules take into consideration various capacities for doing their share, and
- they can better do their own share when complying with the rules.

The first reason why beneficiaries should do their share in accordance with the rules of the scheme from which they benefit is because they benefit from the scheme that is set up and maintained by the compliance of others with its rules. Without the compliance of others with the requirements of a cooperative scheme, beneficiaries would not be able to receive benefits and there will be no benefit for them to reciprocate in return. Because their benefits for which to make a return are made available by the compliance of others with relevant rules, the beneficiaries have an obligation to comply with the rules of the scheme.

Second, beneficiaries should follow the same rules so as to achieve equality of compliance. If beneficiaries do not comply with the rules of a cooperative scheme, they will cause inequality between themselves and

cooperators who have complied with the rules. Thus, just as cooperators have followed the rules of the scheme from which beneficiaries benefit, the latter should equally follow the rules. The compliance of beneficiaries may bring about inequality between them and free-riders who do not comply with the rules. However, this problem of inequality is not a problem with the principle of fairness, which primarily appeals to a natural duty to do one's share. The idea of equal compliance cannot be a moral foundation of the fairness obligation without a natural duty to do one's share that binds all beneficiaries including free-riders. As long as the rules bind all beneficiaries, the non-compliance of free-riders should not be in the way of equality of compliance between cooperators and beneficiaries.

Third, beneficiaries of a cooperative scheme should follow the rules of the scheme because they have different capabilities for doing their share. According to fairness as reciprocity that requires a fair share, more capable beneficiaries should do more while less capable beneficiaries less. It should be noted, however, that beneficiaries who are capable of doing more than their own share are not required to do more than their own share. This is because it is not their capability but their benefit that primarily decides the amount of their share, which is then adjusted to their capability. For example, a country may be able to reduce emissions more than it has been fairly required to do. The principle of fairness does not require the country to do more than their share for the reason that it can. On the other hand, those beneficiaries who are only able to do less than their share should not be required to do more than their capability. There might be some countries that benefit from the Kyoto Protocol but are not able to

bear climate burden as much as they have benefited. These poor beneficiaries are required to do their share as much as they can according to the rules of a cooperative scheme that take into consideration their capability for doing their share. By following the rules, beneficiaries can be required to do their share to the extent that they should be required to do according to their capabilities.

Fourth, following Raz's normal justification thesis (1986: 53), the principle of fairness requires beneficiaries to do their share by obeying the relevant rules that help them to do their share better than when they act according to their own judgement.⁵⁴ If there is a scheme set up for tackling climate change, whether international or national, in which its members comply with the rules, then beneficiaries of the scheme can better do their share by following the same rules.

For example, the US did not ratify the Kyoto Protocol that set up the emissions target of 7% below 1990 level by 2012 for the country while 8% for the EU and 6% for Canada the latter two of which ratified the target⁵⁵. Those countries that ratified the Protocol are complying with the agreement while the US tries to reduce the emissions acting on their own judgement. According to its own plan, The American Clean Energy and Security Act of 2009, the US requires

⁵⁴ The normal justification thesis is basically designed as a way to account for legitimacy of an authority over its subjects by appealing to an instrumental idea that subjects will do better what they already have a reason to do by following the rules of the authority rather than their own judgement. The principle of fairness shares the instrumental idea with the normal justification thesis, but does not go on to justify or legitimise an authority which imposes certain rules. A more detailed discussion about the normal justification thesis as a theory of obligation will be provided later on.

⁵⁵ The Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/3145.php

itself to reduce GHG emissions by 17% below 2005 levels (7,182 Million Metric Tons) by 2020 while the Kyoto target is 7% below 1990 levels (6,187 Million Metric Tons) by 2012. The 1990 base year for the Kyoto target ‘grandfathers’ those countries that had high emissions levels until that date. But, the 2005 base levels for the US is the highest in its whole history of industry⁵⁶. Thus, even if the US reaches its own target, it will be emitting 5,961 Million Metric Tons of CO₂ in 2020, while it will be emitting 5,753 Million Metric Tons in 2012 if it follows the Kyoto target. The US’s own target in 2020 is 4% below its 1990 levels, which is 3% below its Kyoto target 8 years later than the target year 2012. The US could do their share considerably better by following the Kyoto target than it can following its own judgement.

Who are the beneficiaries, then, who are required to do their fair share? The reason why beneficiaries of climate change regimes have an obligation to abide by the rules of the regimes is because they benefit from the regimes created/maintained by the compliance of cooperators. However, there are two kinds of beneficiaries, prospective and retrospective beneficiaries. The principle of fairness identifies only the latter as having the fairness obligation to comply with the rules of the regimes. Let me offer an example.

Suppose Adam washes his clothes in a river from which people drink, thinking that his wash wouldn’t make the big river polluted as he leaves a very small amount of sewage. Adam’s wash does not actually make the river contaminated because the river has sufficient capacity to digest his tiny mess. Having found that the river still looks nice and clean after Adam has washed for

⁵⁶ US Energy Information Administration, <http://www.eia.doe.gov/oiaf/1605/ggrpt/>

the first couple of weeks, a growing number of people start to wash their clothes in the same river, a trivial amount respectively in comparison to the huge capacity of the river. As a matter of fact, the river can purify a certain amount of sewage such that everybody who lives by the river may be thought of as having an individual allowance of sewage fairly allocated by the natural capacity of the river. Notwithstanding, eventually, at the end of sufficient period of time, the river becomes too polluted for people to drink and wash from it because the total amount of sewage has passed the limit of the river's capacity for natural purification. Thus, people who need to drink and wash for their living establish a cooperative scheme to purify the river by sharing the cost of developing a system of water purification and also to recompense those particularly vulnerable to the polluted river for their disadvantage.

In this example, there are two kinds of beneficiaries: prospective and retrospective beneficiaries. Prospective beneficiaries benefit from the river that is purified by the effort of others. The principle of fairness should not be mistaken to mean that prospective beneficiaries are under an obligation to share the burden. They have not necessarily contributed to the pollution of the river; they may have used the water only up to their fair natural share. Prospective beneficiaries are polluters because they contributed to the pollution of the river, but some of them are just *fair polluters* because their contribution to the pollution is made by their use of the river within their individual allowance that is fairly allocated by the natural capacity of the river. The clean water purified by the cooperative effort can be enjoyed not only by those who have used the river more than one's fair allowance, but also by those who are fair polluters. Thus, prospective

beneficiaries who may be simply *fair polluters* are not necessarily to be identified as the beneficiaries who are under the fairness obligation.

On the other hand, those who have contaminated the river by pouring more than their fair share of sewage, and let others establish the scheme of purification, benefit from the scheme in the sense that their wrongdoing is rectified by the efforts made by others (so called ‘the rectificatory benefit’) and to the extent that the burden that should have been borne by them is carried by others (so called ‘the reverse benefit’). They are called *retrospective beneficiaries* because they do not benefit until the effort is established by others to solve the problem which is caused by their past activities. Accordingly, in order for one to be a retrospective beneficiary of climate change regimes, one has to be an unfair polluter or a beneficiary of unfair pollution that causes climate change *and* a scheme of cooperation should be established to tackle the change caused by the polluter. Unfair polluters or beneficiaries of unfair pollution who let others establish climate change regimes at some otherwise-unnecessary cost and enjoy the retrospective benefits are the right beneficiaries to have an obligation to comply with rules of climate change regimes and share the climate burden.

Retrospective benefits received from climate change regimes are not a good that is given by chance, let alone by favour or by nature, but a good that is given as a consequence of an effort that is intentionally made by the regimes for which cooperators have done their share with a sense of obligation. There is no chance for retrospective beneficiaries to avoid the rectificatory and the reverse benefit from climate change regimes. Cooperators in the regimes do not provide

retrospective beneficiaries with such benefits to favour them, but make an effort to reduce the emissions as a result of which retrospective benefits are made available to the beneficiaries. In this sense, retrospective benefits are not produced by nature but by a cooperative effort of persons. Therefore, retrospective beneficiaries have an obligation to do their share in return for their benefit according to the requirement of the regimes that produces the good in question.

Retrospective beneficiaries are to come under the fairness obligation because they benefit from a cooperative scheme of others without doing their share. The principle of fairness requires retrospective beneficiaries not to take advantage of the compliance of others from which they benefit. When they benefit from climate change regimes, i.e., when their unfair emissions are rectified by the effort of others to clear the consequences of the emissions and the burden that should have been borne by them is carried by others, they are taking advantage of the situation in which others have to recover from the environmental disaster. People, no matter how much they contributed to climate change, had to do something urgently about the change because otherwise they would experience worse catastrophes. It is against fairness as reciprocity to take advantage of this situation without doing one's share.

The idea of retrospective beneficiaries is similar to Gosseries' 'transgenerational free-riding' in sharing the view that beneficiaries of historical emissions that inflicted the climate burden on others are to be held obligated to bear the burden. According to Gosseries,

transgenerational free-riding refers to a case of free-riding of one community's current generation on another community's current generation. It is transgenerational because benefits to the current free-rider community and harms to the other one are causally connected through an action (here: historical CO₂ emissions) performed by an earlier generation of the currently free-riding community (Gosseries 2004: 46).

That is, transgenerational free-riders benefit from the past emissions made by their ancestors in their community which inflicted some burden on the current generation of other community. Likewise, retrospective beneficiaries include beneficiaries of historical emissions that caused global climate change.

However, retrospective beneficiaries are distinguished from 'transgenerational free-riders' by two different aspects. First, while 'transgenerational free-riders' include even those who benefit from the fair emissions that did *not* pass one's historical allowance, retrospective beneficiaries are not such beneficiaries of *fair emissions*. It is only beneficiaries of unfair emissions who can be identified as retrospective beneficiaries of a cooperative scheme.

Second, one becomes a transgenerational free-rider when one benefits from the past emissions of one's grandfathers which impose some burden on others. In contrast, unfair emitters or beneficiaries of unfair emissions become retrospective beneficiaries when a cooperative scheme has been established by others to tackle climate change caused by the unfair emissions. Beneficiaries of past emissions become transgenerational free-riders only if the emissions bring about some burden on others. Beneficiaries of unfair emissions become

retrospective beneficiaries only when others set up a scheme of cooperation to clear the consequences of the unfair emissions.

In sum, the principle of fairness requires beneficiaries of climate change regimes to do their share according to the rules of the regimes because it is naturally fair for them to do so and because they actually benefit from the regimes. It is retrospective beneficiaries who are obligated by the principle of fairness because they benefit from the regimes; their unfair pollution/emissions – emissions more than one's fair allowance – are rectified by the regimes and the burden they should have carried is borne by the regimes. They have an obligation to do their share by following the rules for at least four reasons: they benefit from the regimes that are set up and maintained by the compliance of cooperators with the rules; by following the rules, they achieve equality of compliance between themselves and cooperators; they can do their share to the degree rightly required by the rules, and they can do their share better by obeying the rules than by following their own judgement. Retrospective benefits are one of the goods in question for which the principle of fairness should come into effect. The principle of fairness will be understood more clearly by comparison with other theories of obligation.

7.4. CONSENT THEORY OF CLIMATE OBLIGATION

The consent theory of obligation⁵⁷ makes a strong objection to the principle of

⁵⁷ By 'consent', I have in mind any kind of consent: actual, hypothetical, or tacit

fairness by claiming that it is only when beneficiaries have agreed to be bound to the rules of climate change regimes that they can be obligated to follow the rules - even though they do benefit from the regimes (Nozick 1974: 93). Because Nozick's consent argument against the principle of fairness was rebutted in the last chapter, this section deals with it as a competing theory of obligation. The consent theory of obligation seems to suggest a powerful normative basis for international law. The US is not *legally* obligated to follow the Kyoto Protocol because it did not ratify the requirement.

The issue that concerns us, however, is not whether countries are legally obligated to comply with global climate change regimes but whether they are morally obligated to do so. If it is necessary for beneficiaries to consent to the climate obligation, then the consent theory can hardly explain why the US has a moral obligation to obey the Kyoto target for the country. The US was required to achieve its target of reducing GHG emissions by the Kyoto rules. However, while all other countries including Annex I countries have ratified and follow the Kyoto requirement, the US is free from the requirement simply because it has not ratified the requirement in its own interest. The normative power of the requirement imposed on the US is heavily dependent upon the willingness of the US to agree to it. The consent theory cannot establish that the significant emitters like the US are morally obligated to follow the rules of climate change regimes.

Consent theorists may still insist that the US ought to consent when and if there is any good reason to consent, and that once it does consent it is under a strong obligation to follow the rules. That is, consent is not simply dependent

consent.

upon the willingness of the agent. However, this idea leaves the obligation to follow the rules hostage to moral mistakes or self-interest: either (a) one judges mistakenly that there is no moral reason to consent⁵⁸, or (b) one can pursue one's individual self-interest and not consent to the rules. If (a) is the case, i.e., if the US makes a moral mistake *and* fails to ratify the Kyoto rules, then the consent theory will claim that the US is under no obligation to follow the rules.

Some countries may make a correct moral judgement about the contents of consent and do consent to be obligated to follow the rules. However, they need to overcome self-interest. If (b) is the case, i.e., if one pursues one's self-interest and does not consent to the rules, then one is under no obligation to follow the rules, according to the consent theory. It is likely that one would not consent to follow the requirement unless one can expect something in return for one's compliance. An important condition of consent is that receiving a benefit and bearing a burden in return should take place at the same time, or at least that benefit follows burden in a short period of time. However, if burden follows benefit, especially if one is required to bear a burden in return for a benefit that one has received without any expectation of bearing a burden, it is very likely that one would not consent to bear the burden.

The question of climate obligation is such that individuals have already benefited from climate change regimes and are then required to follow rules of the regimes. However, if we are to employ the consent theory, a problem is: individuals would not consent to the requirement because they have obtained

⁵⁸ I owe Matthew Clayton this reply from the consent theory and the possibility of 'moral mistake'.

something from the requirement. In the case of climate obligation, individuals have already benefited from climate change regimes before they are required to reciprocate. The consent theory of obligation can hardly induce them to consent to the rules of the regimes, because they cannot expect anything but what they are required to do, and so it is incapable of generating an obligation to follow the rules.

In sum, the consent theory has some drawbacks as a theory of climate obligation. The consent theory shows that the normative power of the requirement which is right and fair in itself is heavily dependent upon the willingness of the parties. Furthermore, the consent theory leaves an obligation to follow rules of climate change regimes in the hands of those who may make a moral mistake or pursue their self-interest, and do not consent to be obligated to obey the rules.

In contrast, the principle of fairness requires the US to follow the Kyoto target because it benefits from the Kyoto Protocol for which other member countries make an effort to follow their target and share the climate burden and because it is fair for beneficiaries of a cooperative scheme to do their share in return for their benefit. The principle of fairness, which is sensitive to free-riding, does not allow individuals or individual countries to benefit from the effort of others or other countries without doing their share. Fairness as reciprocity on which the principle of fairness is morally based requires the US to reciprocate its benefit from the effort of other countries by obeying the rules established to share the climate burden. Because the principle of fairness appeals to both a moral fact that it is fair to reciprocate one's benefit and an empirical fact that one

benefits from a cooperative scheme of others, the principle is more powerful than the consent theory of obligation in binding the US to the Kyoto requirement.⁵⁹

7.5. NATURAL DUTY THEORY OF CLIMATE OBLIGATION

According to the natural duty theory of obligation, we have a natural duty to follow the (reasonably) just and fair rules of climate change regimes. Rawls writes as follows:

From the standpoint of the theory of justice, the most important natural duty is that to support and to further just institutions. This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves. It follows that if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do what is required of him. Each is bound irrespective of his voluntary acts, performative or otherwise (Rawls 1971: 334).

⁵⁹ Chapter 7 is not designed to show that the Kyoto Protocol is fair to its members and non-members, but to argue that the principle of fairness can justify an obligation to follow the Protocol when necessary conditions are met such as justice and legitimacy of the regime. When I argue that the principle of fairness is better at justifying the climate obligation than the consent theory, I have not examined whether the Kyoto rules are fairly established and applied to its members and non-members because I only focus on the basic ideas that are employed by the principle of fairness and the consent theory.

Rawls stresses that a natural duty applies to anyone even without her voluntary acts.

An immediate response to the natural duty theory of obligation is that the theory does not explain why a particular individual has a duty to obey the rules of a particular institution. According to Dworkin,

That [natural] duty, however, does not provide a good explanation of legitimacy, because it does not tie political obligation sufficiently tightly to the particular community to which those who have the obligation belong; it does not show why Britons have any special duty to support the institutions of Britain (Dworkin 1986: 193).

That is, the natural duty theory of obligation is not sensitive to the identity of the duty bearers and thus the institution to which the duty bearers have a natural duty. All that matters are the status of the rules. Once the theory accommodates the identity of beneficiaries, it is not a natural duty theory any more. If it is beneficiaries of a cooperative scheme who are supposed to have a natural duty to obey the scheme's rules, then it is not only because the rules are reasonably just and fair but also possibly because beneficiaries belong to the scheme or they benefit from the specific scheme that they are required to obey the rules of the scheme. The natural duty theory of obligation, which appeals exclusively to the fairness of the rules, is not persuasive enough to bind a particular individual to the rules of a particular scheme of cooperation.⁶⁰

⁶⁰ For an argument against the natural duty theory of political obligation, see Horton (1992: 98-102) and Klosko (1994).

Waldron (1993) defends the natural duty theory of obligation by trying to overcome two objections levelled against the theory: the “special allegiance” objection, which has been pointed out, and the “application” objection, which will be discussed in a while. First, he takes an example for his argument against the special allegiance objection. According to the example, ‘a New Zealander visiting France is morally bound to obey just provisions of French law, even though they may be different from the provisions of New Zealand law’ (ibid. 8). A New Zealander has a duty to obey the French road rules ‘because justice does not dictate the particular substance of the rule’ (ibid. 8).

Having noticed that theories of ‘acquired obligation’ can explain this kind of duty as well, Waldron goes on to deal with the second objection, the application objection. He highlights a phrase from Rawls’ statement of the natural duty theory, which says that ‘we are to comply with and to do our share in just institutions when they exist and *apply* to us’ (italics added). Waldron encourages us not to misunderstand the word ‘apply’ as to mean that ‘we go back to theories of *acquired* obligation’ (ibid. 7, his italics). And then, he delineates what it is for ‘just institutions to *apply* to us’ in three steps, with a presupposition that the institution in question is a just one.

First, the rules of the institution must be ‘range-limited’ in the sense that they do not apply to ‘outsiders’ who have nothing to do with the rules. For example, when a family distributes a cake among its children following a just rule, ‘to each an equal amount of cake’, this rule does not apply to a child from next door (ibid. 12-3).

Second, the institution must be an effectively working institution in three

senses: its rules must be just; its 'insiders' should accept its administration of the rules; and both 'insiders' and 'outsiders' 'refrain from attacking or sabotaging the institution in its attempts to put the just rules into operation' (ibid. 16-7).

Third, the institution should be legitimate in the sense that it is hypothetically consented to be '*the one* to do justice in the given territory or with regard to the claims that are at issue' (ibid. 22, his italics). Waldron instructs us in what the establishment of legitimacy by hypothetical consent does and does not mean; hypothetical consent in this case does not represent 'a promise to obey the institution' but 'a permission or nomination' of the institution, that is, consent does not ground an obligation to obey the institution, but only confers legitimacy on the institution.

In sum, according to the natural duty theory of obligation, we have a natural duty to obey a just institution that administers 'range-limited' just rules, performs an effective administration in the three senses, and has legitimacy conferred by hypothetical consent. To put it as a theory of climate obligation, we as anyone have a natural duty to obey the rules of climate change regimes that are basically just, 'range-limited' within relevant members, effectively working in the sense that they run just rules that are accepted and not sabotaged, and legitimate in the sense that they are chosen to do justice with regard to relevant claims.

It is not obvious that Waldron's defence of the natural duty theory of obligation has successfully overcome the special allegiance objection. He argues that 'a New Zealander visiting France is morally bound to obey just provisions of French law, even though they may be different from the provisions of New

Zealand law' (ibid. 8). However, does a New Zealander who is not visiting France but stays in her country have a natural duty to obey just provisions of French law simply because the law is just? A New Zealander may have a duty to respect just French law, but only when there is a special connection between her and France as when she is visiting France. As Rawls states, the law should 'apply' in the sense that Waldron explains, i.e., 'range-limited'; French law applies to those who reside in or visit the country, (or it applies to French citizens outside France). A New Zealander visiting France has an obligation to obey French law not only because the law is just but also because she has entered France. The fact that she has entered France can be interpreted as a kind of consent to French law or as a benefit in the sense that she is under French national security or social order. Thus, the natural duty theory of obligation does not stand its ground alone but is dependent upon the idea of consent or benefit.

The principle of fairness does appeal to a natural duty for beneficiaries to do their share in accordance with the rules of the scheme from which they benefit not because the rules are reasonably just and fair but because it is fair for them to do so. Of course, the rules have to be fair, but this is not the reason but one of the necessary conditions for the fairness obligation. Beneficiaries of climate change regimes are naturally required to do their share in return for their benefit. Thus, the fairness obligation based on fairness as reciprocity is similar to the natural duty for everyone to obey (reasonably) just institutions in the sense that both the fairness obligation and the natural duty appeal to the rightness of the requirement itself.

However, while the natural duty theory of obligation cannot explain why

a New Zealander visiting France has an obligation to obey French law without depending on the idea of consent or benefit, the principle of fairness can explain the same obligation on its own. A New Zealander visiting France has an obligation to obey French law, according to the principle of fairness, because she benefits from the law. She has an obligation to obey French law both because she has a natural duty to do her share in return for her benefit and because she benefits from the law in the sense that she has come under French national security or social order. Her act of benefiting is not a moral foundation of the requirement of reciprocity, but activates the requirement. Those who enjoy benefits thanks to the effort of others have a special obligation to do their share in return for the specific effort, which has a universal normative force on the basis of the requirement of fairness as reciprocity and is practically and specially activated by an act of benefiting.

7.6. THE NORMAL JUSTIFICATION THEORY OF CLIMATE OBLIGATION

Raz's normal justification thesis might be employed as a theory of climate obligation. His thesis is:

The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority

as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly (Raz 1985: 18-9).

The normal justification thesis suggests a way to justify an authority over its subjects by employing an instrumental idea (Christiano 2008, 233) that subjects can better do what they have a reason to do by following the requirement of the authority than their own judgement. The principle of fairness agrees and employs the idea of better performance as a reason for beneficiaries to follow the rules of a cooperative scheme when they are required to do their share. However, the principle does not depend on the normal justification thesis in morally founding the fairness obligation to be imposed on beneficiaries, let alone justifying the authority of the scheme that binds beneficiaries.

The normal justification thesis is basically designed to justify an authority over its subjects, which straightforwardly involves an obligation for the subjects to obey the requirements imposed by the authority. Raz writes:

they have legitimate authority only if and to the extent that their claim is justified and they are owed a duty of obedience (ibid. 5); all the other functions authorities may have are ultimately explained by reference to the imposition of duties (Raz 1985: 12).

That is, without being owed a duty for its subjects to follow the directives of an authority, the authority is not a legitimate authority, but only ‘a justified use of coercive power’. For Raz, a legitimate authority is binding and its subjects have an obligation to comply with the requirements of the authority (1986: 53). The

authority of a scheme of cooperation to tackle climate change is justified by its rules that help beneficiaries of the scheme to do their share better than the judgement of beneficiaries; thus beneficiaries have an obligation to follow the rules of the scheme, according to the normal justification theory of climate obligation.

There is another point that needs to be taken into consideration for understanding the normal justification theory. The authority of the scheme that is owed an obligation by beneficiaries is not without control; it should pass a test laid by the dependence thesis. Just as the normal justification thesis implies that the subjects can better do what they have 'dependent reasons' to do by following the directives of an authority, the dependence thesis requires that:

All authoritative directives should be based, in the main, on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive (ibid. 14).

For example, when people have a practical reason to drive safely on a road, they can better do so by following, not their own judgement, but traffic rules set up for the purpose of road safety. If the rules do not reflect the aim of promoting road safety, then they lose authority and people have no obligation to obey the rules. The rules are no more binding unless they are meant to be working for the dependent reason, road safety.

Nonetheless, the reason why people should follow the rules are 'content-independent', according to the normal justification thesis. That is, they should

follow the rules not because the rules reflect the dependent reason but because they are issued by a legitimate authority. People should follow traffic rules because they can better drive safely by complying with them. In order that people have an obligation to obey the rules, while it is necessary for the rules to be meant to serve the dependent reason, it is sufficient for the rules to help people to perform what they have the dependent reason to do. Thus, people have an obligation to obey the rules even if the rules do not rightly reflect the dependent reason on which they should be based, because ‘there is no point in having authorities unless their determinations are binding even if mistaken’ (ibid. 15).

In addition, in order for an authority to be able to bind its subjects to what it requires them to do on the basis of a dependent reason, it preempts judgements by the subjects. Raz says that it is necessary for individual judgements to be replaced by the rules of an authority.

Since the justification of the binding force of authoritative directives rests on dependent reasons, the reasons on which they depend are (to the extent that the directives are regarded simply as authoritative) replaced rather than added to by those directives... Because authorities do not have the right to impose completely independent duties on people, because their directives should reflect dependent reasons which are binding on those people in any case, they should have the right to replace people’s own judgement on the merits of the case. Their directives preempt the force of at least some of the reasons which otherwise should have guided the actions of those people (ibid. 24).

As long as the directives reflect correctly dependent reasons on which they should be based, they should take the place of the dependent reasons, only by which they can obtain the authority that is necessary in binding its subjects and helping them to do what they have dependent reason to do.

In sum, the normal justification theory of climate obligation is based on the idea that dependent reason is replaced by ‘content-independent reason’ for an obligation to obey the rules that are still binding even when they are mistaken. It is because beneficiaries of a cooperative scheme can better do their share by following the scheme’s rules that should reflect their fair share and replace judgements by beneficiaries, that they have an obligation to follow the rules.

A problem with the normal justification theory of obligation is that it does not offer a necessary reason for us to obey the rules of climate change regimes. The theory may enable individuals to achieve what they have dependent reason to do by binding them to the rules. However, this is not necessary for the justification of an obligation to obey the rules of the regimes. There must be a further procedural requirement; the rules must be decided in a consultative⁶¹ manner. With regard to the normal justification, because the rules have their own reasons to apply to beneficiaries independently of dependent reason and also because individual judgements about what to do are substituted with the directives of the authority, the rules do not necessarily have to consult

⁶¹ I believe that substantive rather than formal consultation is necessary for a democratic process, substantive consultation in the sense that individuals take part in the process of setting up and maintaining the rules by affecting as well as simply being noticed by the process. Further discussion about the idea of consultation is not pursued here as it is not relevant to the main discussions of the chapter.

beneficiaries, as a result of which the obligation bearers are excluded from the process of setting up or maintaining the rules.⁶² This reveals that the normal justification theory of obligation damages the procedural aspect of an authority (Herskovitz 2003: 212-3). The lack of consultation may provide beneficiaries with legitimacy for them not to obey the rules.

By contrast, a necessary condition for the principle of fairness is that all (potential) beneficiaries should have been consulted about establishing or maintaining a cooperative scheme and its rules, and also that a majority of beneficiaries should have agreed to the rules. While the normal justification of the authority of the rules that beneficiaries are required to follow can be authoritarian in the sense that beneficiaries are required to obey the rules without being consulted about the rules, the principle of fairness is democratic as well as authoritative because the rules the principle requires beneficiaries to obey are not only morally based on the fairness of doing one's share but also widely consulted about and democratically agreed to by beneficiaries, which does not require unanimity, though.

However, the democratic aspect of the principle of fairness does not automatically entail the idea that the rules can be imposed only on beneficiaries who consent to the rules. There may be some beneficiaries who would not consent to the rules of the scheme they are required to follow. However, the principle of fairness is not a consent-based but a duty-based theory of obligation. Beneficiaries are required to do their share by obeying the rules even though they

⁶² Similarly, Christiano argues that the normal justification thesis 'ignores the moral significance of disagreement among equal citizens' (2008: 234).

have not consented to the rules. They are to do their fair share by following the rules if they have been democratically decided, irrespective of whether they have consented or not. Thus, the US should follow the Kyoto target if the requirement is the product of wide consultation and democratically accepted for the common good and if the target is fair enough to the US in comparison with the targets for other countries. When these two conditions are met, the ratification of the US is not necessary for imposing the target on the country.

7.7. CONCLUSION

To recall the main question of this chapter - why do we have a moral obligation to follow rules of climate change regimes? I have proposed the principle of fairness as a theory of climate obligation and argued that the principle is preferable to other theories of obligation - the consent theory, the natural duty theory, and the normal justification theory of obligation - with regard to the question of climate obligation. The principle of fairness suggests that we as retrospective beneficiaries of the regimes have an obligation to do our share in accordance with the rules of the regimes because it is naturally fair to reciprocate one's benefit and because we do benefit from the regimes.

It goes without saying that the rules beneficiaries are required to follow must be just and fair in some senses. This means that the question of justice is relevant to the question of obligation; in fact, a plausible theory of obligation cannot operate without a theory of justice. The principle of fairness as a theory of

obligation presupposes that the rules of a cooperative scheme with which cooperators comply and beneficiaries are to comply should be just and legitimate, at least from a reasonable point of view.

However, the fact that it is necessary to discuss the justice of the rules for a theory of obligation does not indicate that the question of obligation collapses into the question of justice. The justice of the rules does not exhaust the question of obligation which discusses a justification of an obligation to obey the rules. An obligation to obey the rules can be justified without referring to how the rules can be just, although how just the rules are, is still relevant to the justification of an obligation. In other words, the rules can be binding irrespective of what the rules contain for their justness, if the rules satisfy some reasonable degree of justice. It is not the content of justice but the degree of justice that is necessary for the authority of the rules. The importance of the distinction between the content and the degree of justice with regard to a justification of an obligation to obey certain rules is supported by Rawls' distinction between legitimacy and justice.

Note first that democratic decisions and laws are legitimate, not because they are just but because they are legitimately enacted in accordance with an accepted legitimate democratic procedure. It is of great importance that the constitution specifying the procedure be sufficiently just, even though not perfectly just, as no human institution can be that. But it may not be just and still be legitimate, provided it is sufficiently just in view of the circumstances and social conditions (Rawls 1993 & 1996: 428).

As long as the rules we are obligated to follow are legitimate in a given sense,

they can be regarded as authoritative and binding unless they are unacceptably unjust from the view of social circumstances. Although there can be many ways to follow in justifying the imposition of an obligation to abide by certain rules, the question of justice that deals with the contents of the rules is not relevant to the task of the question of obligation, provided that the rules reach an acceptable degree of justice. Principles of justice can be sensitive to equality, liberty, or right. However, as far as an obligation to follow the principles is concerned, what they are sensitive to is not relevant, but the degree that they satisfy the ideal of justice.

Nonetheless, although it is necessary for the rules of climate change regimes to be reasonably just for the justification of an obligation to obey the rules, we are not automatically bound to such rules in the absence of a plausible theory of obligation for the problem of climate obligation. The principle of fairness as a theory of obligation asserts that beneficiaries of climate change regimes have an obligation to do their share in accordance with the regimes' rules primarily because it is fair for them to reciprocate their (retrospective) benefit and because they benefit from the regimes for which cooperators comply with the rules.

AFTERWORD

Realising the need for a theory of obligation in the age of theories of justice, the thesis has developed the principle of fairness comprehensively as a plausible theory of individual obligation. Having explored the moral foundations and candidate conditions of the principle in detail, the thesis stated the revised principle of fairness. In addition, the main objections levelled against the principle have been rebutted and the principle has been applied to the problem of global climate change. According to the principle of fairness, briefly speaking, it is fair that individuals who benefit from a cooperative scheme of others have an obligation to do their share in return for their benefit by obeying the scheme's rules; the so called fairness obligation.

There may be two kinds of sceptics about the principle of fairness as a theory of obligation. Some may not believe that a theory of obligation is really necessary when we have a theory of justice. The thesis has been motivated by the belief that there is a role for a theory of obligation to play in achieving social justice. Just social arrangements are not realised by themselves. Their realisation depends on the coordinated activities of individuals. Because this is the case, we need a defence of the claim that individuals have an obligation to follow the rules of just institutions. By offering a plausible defence of that claim, the principle of fairness as a conception of individual obligation is a necessary and ideal complement to a conception of justice.

On the other hand, some may not be convinced of the plausibility of the

principle of fairness as a theory of obligation. Even though the principle appeals to our strong intuition about fairness as reciprocity, it may not look as strong as the consent theory of obligation. The last chapter of the thesis dealt with the natural duty theory and the normal justification theory as well as the consent theory of obligation, with regard to the obligation to follow rules of climate mitigation regimes. However, although I provided some reasons to explain why the principle of fairness provides a conception of our obligations with respect to following the rules of climate mitigation regimes, there is scope for further comparison between the principle of fairness and other theories of obligation to help our sceptics understand the significance of the former. This comparison may be made, for example, on the problem of political obligation.

In this light, the principle needs to be applied to many more practical issues in the future. The thesis has test-driven the principle only with respect to one such issue, global climate change. The more the principle can deal effectively with the different practical issues we face, the wider its applicability becomes, and the deeper its theoretical basis is consolidated. I hope that the thesis has at least prepared the principle of fairness for its practical applications to many more practical issues and topics.

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